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Class Action Litigation 2019

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Howard S. Suskin

LITIGATION AND ADMINISTRATIVE PRACTICE SERIES
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Prepared for distribution at the
CLASS ACTION LITIGATION 2019
Program
New York City, June 3, 2019

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Program Attorney: Dana M. Berman

Program Schedule

Class Action Litigation 2019
June 3, 2019
PLI - NYC

AGENDA

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9:00
Opening Remarks
Jayne A. Goldstein, Howard S. Suskin

9:15
Recent Developments in Class Action Litigation
- Supreme Court Developments
- Legislative and Rules Amendment Developments
- Emerging and Hot Class Certification Issues
- Choice of Forum Considerations
- MDL Developments
- Settlement Developments and Issues
- Class Actions and Arbitration
- CAFA
- Government and Nonprofit Class Action Issues
- Class Actions and Personal Jurisdiction

Adam Zimmerman

10:15
Recent Developments in Class Action Notice and Claims Administration
- Increasing Judicial Scrutiny of Notice and Settlement Administration Issues
- Settlement Administration in the Digital Age
- Pros and Cons of New Media Options in Class Notice

Eric Schachter

11:15 Networking Break

11:30

Settlement and Mediation of Class Action Litigation

- What to include in a mediation brief
- Should you share your briefs with opposing counsel prior to mediation?
- How to pace money negotiations
- At what point do you give your final and best offer?
- How to best use a mediator's proposal
- What does a mediator look for in a brief?
- What does a mediator see as road blocks to a successful mediation?

Hon. Carolyn Demarest, Jayne A. Goldstein, Howard S. Suskin

Afternoon Session:

1:00 Lunch

2:00

Litigation Strategies for Class Action Practice

- Prominent leaders of the bar give advice on litigation best practices
- How strategies have evolved in class action litigation based on Supreme Court class action rulings
- Important lessons learned from class action litigation over the years

Joel Feldman, Natalie Finkelman Bennett, Andrew Lichtman, Sharon Robertson

3:30 Networking Break

3:45

Ethical Issues in Class Action Litigation

- Ethical issues related to the solicitation of class members
- Who does plaintiffs' counsel actually represent for purposes of the no-contact rule?
- Ethical considerations regarding the use of informal discovery tools, including investigators, social media and the internet
- Ethical issues related to funding of expenses
- Conflicts of interest in class representation
- Ethical issues relating to cooperation agreements among litigants – defense and plaintiffs' sides
- Ethical obligations with regard to settlement negotiations

David G. Keyko

5:00 Adjourn

Faculty:

Co-Chairs:

Jayne A. Goldstein
Shepherd Finkelman Miller & Shah LLP
Ft. Lauderdale, Florida

Howard S. Suskin
Jenner & Block LLP
Chicago

Hon. Carolyn Demarest
Mediator/Arbitrator
JAMS
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Milwaukee, Wisconsin

Adam Zimmerman
Professor of Law
Gerald Rosen Fellow
Loyola Law School
Los Angeles

Program Attorney: Dana M. Berman

Faculty Bios

Jayne Arnold Goldstein
Shepherd Finkelman Miller & Shah LLP

Jayne Arnold Goldstein joined Shepherd Finkelman Miller & Shah LLP in January 2017 in the Firm's Ft. Lauderdale, Florida office. She brings to SFMS her expertise in representing individuals, businesses, institutional investors and labor organizations in a variety of complex commercial litigation, including violations of federal and state antitrust and securities laws and unfair and deceptive trade practices. Ms. Goldstein was lead counsel in *In re Sara Lee Securities Litigation*, and has played a principal role in numerous other securities class actions that resulted in recoveries of over $100 million. She is currently serving as co-lead counsel for indirect purchasers in *In re Actos Antitrust Litigation*, as well as serving on the executive committee of four other pay for delay pharmaceutical antitrust cases. She is a member of the Plaintiffs' Steering Committee in *In re Generic Pharmaceuticals Pricing Antitrust Litigation*. Ms. Goldstein was co-lead counsel for indirect purchasers and served as a member of the trial team in *In re Nexium Antitrust Litigation*, the first reverse payment case to go to trial after the United States Supreme Court's decision in *F.T.C. v. Actavis, Inc*. In addition, Ms. Goldstein served on the discovery team in *In re OSB Antitrust Litigation* (E.D. Pa.) and was allocation counsel in *McDonough v. Toys "R" Us, Inc. et al*. (E.D. Pa). Ms. Goldstein has served as class counsel in a wide variety of consumer class litigation, including *Gemelas v The Dannon Company*, which resulted in the biggest settlement ever against a food company; *Weiner v. Beiersdorf North America Inc. and Beiersdorf, Inc*. (D. Conn.) (co-lead); *Messick v. Applica Consumer Products*, *Inc*. (S.D. Fla.) (co-lead); and *Leiner v. Johnson & Johnson Consumer Products, Inc*. (N.D. Ill.) (co-lead).

Ms. Goldstein began her legal career in 1986, with a wide-ranging general practice firm in Philadelphia. In 2000, she was a founding shareholder of Mager & White, P.C. and opened its Florida office, where she concentrated her practice on securities, consumer and antitrust litigation. In 2002, the firm became Mager White & Goldstein, LLP. In 2005, Ms. Goldstein was a founding partner of Mager & Goldstein LLP. Most recently, she was a partner at Pomerantz LLP.

Ms. Goldstein, a registered nurse, received her law degree from Temple University School of Law in 1986 and her Bachelor of Science (highest honors) from Philadelphia College of Textiles and Science.

Ms. Goldstein is a member the Florida Public Pension Trustees Association and the Illinois Public Pension Fund Association. Ms. Goldstein is a contributor to a book published by the American Bar Association, <u>The Road to Independence: 101 Women's Journeys to Starting Their Own Law Firms</u>. She resides in Delray Beach, Florida with her family. She is active in community affairs and charitable work in Florida, Illinois and Pennsylvania.

Since 2010, Ms. Goldstein served as co-chair of P.L.I.'s Class Action Litigation Strategies Annual Conference held in New York. In January 2018 Ms. Goldstein chaired

P.L.I.'s new annual program Women Lawyers in Leadership, a program she developed. Ms. Goldstein has been a frequent speaker at Public Pension Fund Conferences having recently appeared on Panels at the Florida Public Pension Trustees' Association and Illinois Public Pension Fund Association.

She is admitted to practice law in the Supreme Court of the United States, the State of Florida, as well as in the Commonwealth of Pennsylvania, State of Illinois and numerous federal courts, including the United States District Courts for the Southern, Northern and Middle Districts of Florida, the Eastern District of Pennsylvania, the Northern District of Illinois, the United States Courts of Appeal for the First, Second, Third, Seventh and Eleventh Circuits. In addition to these courts and jurisdictions, Ms. Goldstein has worked on cases with local and co-counsel throughout the country and worldwide.

Howard S. Suskin
Jenner & Block LLP

Howard S. Suskin is a partner in Jenner & Block's Litigation Department and Co-Chair of the firm's Securities Litigation Practice and its Class Action Practice. Mr. Suskin has substantial first-chair experience representing individuals and business entities in civil and criminal securities matters, including class actions alleging securities fraud and misrepresentation claims, derivative actions claiming breach of fiduciary duty, contests for corporate control, insider trading investigations and broker-dealer issues. He serves as an arbitrator with the American Arbitration Association, and for self-regulatory organizations including the Chicago Board Options Exchange, FINRA and the National Futures Association. Mr. Suskin is an active member of the ABA Securities Law Committee, including serving as Co-Chair of the Class and Derivative Actions Subcommittee. Mr. Suskin currently serves as General Counsel for the Chicago Bar Association (CBA), and served previously as a member of the CBA's Board of Managers and as Chairman of the CBA's Class Action Committee, Bench & Bar Committee, Financial & Investment Services Committee and Securities Law Committee. Mr. Suskin is a member of the Advisory Board of *Board IQ*, a *Financial Times* publication, and *The Deal*, has served as a member of the Securities Editorial Advisory Board of *Law360*, and serves on the faculty of Practising Law Institute. He has lectured extensively and has published numerous treatises and articles on issues relating to arbitrations, class actions and securities law, including serving as editor and co-author of the West Publishing *Illinois Civil Litigation Guide*, Moore's *Federal Civil Motion Practice* and *Pretrial Civil Litigation*, the Illinois Institute of Continuing Legal Education Treatise on Class Actions, and the ABA's Annual Survey of State Class Action Litigation. Members of the Leading Lawyers Network have consistently recognized Mr. Suskin's work in several areas including class actions, commercial litigation, alternative dispute resolution, and securities and venture financing law. He has been named one of the "Best Lawyers in America" for commercial litigation, and has been recognized eight times as a "Top 100 Illinois Super Lawyer." Mr. Suskin graduated from Northwestern University with distinction, where he was elected to Phi Beta Kappa, and obtained his J.D. degree with honors from the University of Michigan Law School, where he was a member of the *Michigan Law Review*.

Natalie Finkelman Bennett
Shepherd Finkelman Miller & Shah LLP

Natalie Finkelman Bennett practices in the Firm's Philadelphia area office. She concentrates her practice on antitrust and consumer litigation, and also has significant experiencing representing clients in a wide variety of wage/hour, defective product, *qui tam*, and unfair trade practices cases. Ms. Finkelman currently serves as a co-lead in *Riaubia v. Hyundai Motor America* (E.D.Pa.) (defective product), *Reed v. Bayada Home Health Care, Inc*. (Phila. C.C.P.) (wage and hour litigation), *Wilson v. AAA South Jersey Inc*. (N.J.Super.) (false advertising). SFMS and Ms. Finkelman served as a co-lead counsel in a vigorously contested MDL against Caterpillar, Inc., *In re: Caterpillar, Inc., C13 and C15 Engine Products Liability Litigation*, MDL No. 2540 (D.N.J.), and also currently serve as co-lead counsel on several additional cases involving defective emissions technology, including Q*+Food v. Mitsubishi Fuso Truck of America, Inc.* (D.N.J.), *B.K. Trucking, Co. v. Paccar, Inc., et.al.* (D.N.J.); and *McDermott v. Cummins, Inc.*, (D.N.J.). Ms. Finkelman was a member of the executive committee in *In re Nexium (Esomeprazole) Antitrust Litig.* (D. Mass.) the first pay-for-delay action that went to trial after *Actavis*, and is also currently a member of the Executive Committees of *In re Suboxone Antitrust Litig.,* (E.D. Pa.), *In re Aggrenox Antitrust Litig.*, (D. Conn.), and *In re Niaspan Antitrust Litig.* (E.D. Pa.).

Ms. Finkelman earned her undergraduate degree from the Pennsylvania State University (high honors) and earned her law degree from the Temple University School of Law (high honors). After clerking for former Chief Judge Farnan of the United States District Court for the District of Delaware, Natalie began working at Schnader Harrison Segal & Lewis. In 1996, Natalie became an associate at the law firm of Mager Liebenberg & White, where her practice was concentrated in antitrust and consumer protection class action litigation. In 1998, Natalie became a founding partner in the law firm of Liebenberg & White before joining SFMS in 2000. She is admitted to practice law in the State of New Jersey, as well as the Commonwealth of Pennsylvania and numerous federal courts, including the United States District Courts for the District of New Jersey and Eastern District of Pennsylvania, and in the United States Courts of Appeal for the First, Third and Ninth Circuits. In addition to these courts and jurisdictions, Natalie has worked on cases with local counsel and co-counsel across the country and worldwide.

Ms. Finkelman is a member of the American Bar Association. She also is a former member of the Temple American Inn of Court and Pennsylvania Bar Association Commission on Women in the Profession, and has participated in mentoring programs for law school students. Natalie has presented on numerous panels, including recently for the 2017 American Bar Association Spring Meeting ("Advertising Bargains - Is the Price Right?") and Strafford Webinars (*e.g.,* Class Action Notice Requirements: Leveraging Traditional and Emerging Media to Reach Class Members).

Ms. Finkelman has also served as a member of the Board of Directors of her synagogue. She resides in Wallingford, Pennsylvania with her family and is active in community affairs and charitable activities in Pennsylvania.

Hon. Carolyn Demarest (Ret.)
Mediator/Arbitrator, JAMS

Hon. Carolyn Demarest (Ret.) served as Presiding Justice of the Commercial Division, Supreme Court, Kings County from its inception in 2002 through 2016. As Presiding Justice, Judge Demarest developed the Commercial Division into one of the most influential commercial courts in the country. She is a revered and universally respected figure in the judiciary.

Justice Demarest served for 26 years on the Supreme Court, Kings County, from 1990-2016. Her substantial practice area expertise includes banking, business/commercial, condominium/co-op, class action, employment, environmental, health care, intellectual property, professional liability, and real property. Prior to her term at the Supreme Court, she served as a Justice for five years in the Family Court of the State of New York where she gained expertise in matrimonial and family law matters.

Justice Demarest began practice as an associate at Skadden, Arps, Slate, Meagher & Flom where she handled both corporate and litigation matters. Following service to Civil Court Judge Stanley Danzig as a Law Clerk, Justice Demarest served for seven years as Assistant Chief of the Appeals Division of the New York City Corporation Counsel where she was responsible for drafting briefs and arguing appeals on all aspects of city business including issues of constitutional, administrative and municipal law, labor, torts, contracts, education and civil service law.

In 1985, Mayor Koch appointed Justice Demarest to the Family Court of the State of New York where she continued to serve until her appointment to the Supreme Court by Governor Mario Cuomo in 1990. In 1991, Justice Demarest was elected to the New York State Supreme Court, Kings County.

Justice Demarest is known as a leader in jurisprudence within the legal community. She has served on the Civil Law and Skills Curriculum Committees for the annual Judicial Seminars and was the editor and an author of the Kings County Criminal Term Manual. She is a frequent lecturer for New York State Bar Association CLE courses and was a member of the New York State Bar Association Task Force on CLE.

Joel Feldman
Partner, Sidley Austin LLP

Joel Feldman is a senior counsel at Sidley Austin's Chicago office.

He has served as lead defense counsel in over 150 financial services class actions venued in over 30 federal and state courts throughout the U.S., covering ERISA benefit plans, annuities, life insurance, ERISA fee class actions, property and casualty insurance, and actuarial issues associated with financial services products.

Joel has won, through motion practice, a series of precedent setting class actions wherein many other similarly situated defendants had settled, often for large sums of money. Most recently he has won a series of dismissals with prejudice in ERISA fee cases. These include dismissals with prejudice of an ERISA stable value class action (*Barchok v. Galliard et al*, D. R.I.; on appeal), an excessive fee ERISA class action *(McCaffree v. Principal Life Ins. Co.*, 8th Cir.) and an ERISA class action alleging that a plan's 401(k) fund "menu" included too many actively managed funds with excessive fees (*Rosen v. Prudential*, D. Conn.).

Joel has also served as lead counsel in winning the only complete class certification denial (*Rowe v. Bankers, N.D. Ill.*) and only complete summary judgment victory (*Kennedy v. Jackson National, N.D. Cal.*) amid the myriad of senior citizen annuity class actions, wherein many other defendants had settled. He has also served as lead counsel in the only ERISA revenue sharing class actions where courts denied class certification (*Ruppert v. Principal,* S.D. Iowa) and granted summary judgment (*Leimkuehler v. American United Life*, S.D. Ind.). He served as lead counsel in the first summary judgment victory among the many retained asset class actions (*Rabin v. MONY,* S.D. N.Y.), and won the denial of class certification in a cost of insurance class action, wherein numerous other defendants in similar class actions had settled (*Gregurek v. United of Omaha*, C.D. Cal.). Joel also served as lead counsel in *In re Industrial Life Insurance Litigation*, MDL No. 1371 (E.D. La.), where in 2006 the court denied class certification after almost all other defendants had settled. In addition to motion practice victories, Joel successfully tried a securities fraud class action to a jury verdict, named by the *National Law Journal* as one of the top ten trials of the year.

Joel co-chaired for ten years the PLI National Class Action Conference in New York. He is the past chair of the Chicago Bar Association Federal Civil Procedure Committee, past chair of the American Bar Association Securities Litigation Subcommittee on Secondary Liability, and past editor-in-chief of *Securities News*, the official ABA publication for the Securities Law Committee.

In 2017, Joel was named a BTI "Client Service All-Star." He is also recommended in Insurance: Advice to Insurers and ERISA litigation in *The Legal 500 US* 2014–2017, and has been recognized as a "Best Lawyer" in the 2014–2017 editions of *The Best Lawyers in America* in Insurance Law.

David G. Keyko

Partner, Pillsbury Winthrop Shaw Pittman LLP

David G. Keyko is a partner in the law firm's Litigation practice and is located in the New York office. His practice has focused on major, complex litigation, often involving multiple parties. He has handled cases involving allegations of securities or other types of fraud, antitrust violations, ethics issues and trusts and estates issues across the country, often involving insurance coverage issues. He has conducted internal investigations and represented clients responding to government probes. Trials include: representing a plaintiff in a four-week bench trial in federal court in New York concerning a fraudulent scheme to finance the importation of coffee beans, which resulted in a $90 million judgment; a five-week jury trial in federal court in New Jersey concerning an alleged scheme to manipulate world-wide commodity prices; and a four-month bench trial in federal court in Louisiana concerning the finances of a bankrupt oil and gas company. He has also served as an expert witness in connection with legal malpractice litigation. Among the prominent cases Mr. Keyko has handled was the representation of the primary claimant to a $1.5 billion estate in lawsuits filed in several jurisdictions.

Mr. Keyko was named the "New York City Best Lawyers Ethics and Professional Responsibility Law Lawyer of the Year" for 2012 and 2017. He has lectured and written widely on securities, antitrust, legal ethics and general litigation topics, and chairs PLI's programs on federal pretrial practice and ethics for corporate lawyers. He is a former columnist for the *New York Law Journal* and has written several dozen articles on litigation and ethics issues for such publications as the National Law Journal, and Metropolitan Corporate Counsel, on whose advisory board Mr. Keyko served.

Mr. Keyko has undertaken a variety of pro bono projects, including representing for over 20 years a death row inmate in Alabama asserting that the inmate is innocent of the crime for which he was convicted, serving as Chair of the Board of MFY Legal Services, Inc., and serving two terms as a member of the Departmental Disciplinary Committee of the First Department. He was Chairman of the Professional Responsibility Committee of the Association of the Bar of the City of New York. He chaired the ad hoc committee of the Association that commented on proposed SEC regulations under Section 307 of the Sarbanes-Oxley Act of 2002. He is currently the chair of the Association's Legal Referral Service Committee and is a member of the Association's Professional and Judicial Ethics Committee.

Andrew Lichtman
Jenner & Block LLP

Andrew Lichtman is a partner in Jenner & Block's Litigation Department. He represents companies in complex civil litigation primarily in the areas of securities, mergers and acquisitions, derivative suits, general commercial disputes, antitrust, and consumer protection. Mr. Lichtman also has significant experience representing companies and individuals being investigated by the Securities and Exchange Commission, the Department of Justice, and state attorneys general.

Mr. Lichtman's recent engagements have included:

- Defending a bank in numerous residential mortgage-backed securities cases arising out of the financial crisis.
- Defending a bank in securities and antitrust class action relating to alleged manipulation of an interest rate benchmark.
- Defending a leading e-commerce company in securities class action and related derivative actions alleging inflated revenue figures in connection with initial public offering.
- Defending a food manufacturer in several securities class actions following announcement of M&A agreement.
- Defending a marketing firm in securities class action alleging fraudulent accounting scheme.
- Defending a leading car rental company in class action alleging violations of state consumer protection laws.
- Representing an investment manager under investigation by the SEC.
- Representing a hedge fund manager under investigation by the SEC.

Before joining Jenner & Block, Mr. Lichtman served as a law clerk to the Honorable Julio M. Fuentes of the United States Court of Appeals for the Third Circuit and to the Honorable R. Barclay Surrick of the United States District Court for the Eastern District of Pennsylvania. Mr. Lichtman received his J.D. from New York University School of Law in 2010, where he graduated magna cum laude and Order of the Coif. He graduated Phi Beta Kappa from Cornell University in 2007.

Sharon Robertson
Cohen Milstein Sellers & Toll PLLC

Sharon Robertson is a Partner at Cohen Milstein and a member of the Antitrust practice group.

Ms. Robertson has been repeatedly recognized for her success in leading complex, multi-district antitrust litigation. In 2018, the American Antitrust Institute honored her with its prestigious "Outstanding Antitrust Litigation Achievement by a Young Lawyer" award for her role in securing one of the largest recoveries by end-payors in a federal generic suppression case in more than a decade. Similarly, The Legal 500 selected her as a "Next Generation Lawyer" (2017 and 2018), an honor bestowed upon only 10 lawyers under 40 years old across the country, who are positioned to become leaders in their respective fields. Likewise, The New York Law Journal recognized her as a Rising Star (2018) – one of only twenty individuals selected to receive this honor. In addition, Benchmark Litigation selected Ms. Robertson for inclusion on its "40 & Under Hot List" (2018) and Law360 named her as one of five "Rising Stars" (2018) in the field of competition law whose "professional accomplishments belie their age", as did Super Lawyers (2014-2016). Ms. Robertson has also been recognized by Law360 as one of a few female litigators to secure leadership roles in high-profile MDLs, such as *In re Lidoderm Antitrust Litigation*, (March 16, 2017).

Ms. Robertson is spearheading the firm's efforts in cutting-edge and industry-defining pay-for-delay pharmaceutical antitrust lawsuits, which allege that the defendant brand manufacturer entered into non-competition agreements with generic manufacturers in order to delay entry of lower-priced generic products. Ms. Robertson also heads up the firm's generic price-fixing cases, which allege that certain generic drug manufacturers conspired to inflate the prices of generic drug products. These cases come on the heels of a government investigation led by the U.S. Department of Justice alleging similar conduct, which, while ongoing, has already resulted in indictments and guilty pleas.

In addition to leading complex MDLs, Ms. Robertson is an accomplished trial lawyer. She served as a trial team member in two of the largest antitrust cases tried to verdict, including *In re Urethanes Antitrust Litigation*, where the jury returned a $400 million verdict, which was trebled by the Court, as required by antitrust law, to $1.06 billion, resulting in the largest price-fixing verdict in U.S. history, as well as *In re Nexium Antitrust Litigation*, the first pharmaceutical antitrust case to go to trial following the Supreme Court's landmark decision in *FTC v. Actavis*, 570 U.S. 756 (2013).

Ms. Robertson co-chairs the firm's Professional Development and Mentoring Committee and serves on the firm's Diversity Committee. She is also an active member of the Executive Committee for the Antitrust Section of the New York State Bar Association.

While attending law school, Ms. Robertson was an intern in the Litigation Bureau of the Office of the New York State Attorney General and the United States Court of Appeals for the Second Circuit. Additionally, while in law school, Ms. Robertson was selected as an Alexander Fellow and spent a semester serving as a full-time Judicial Intern to the Hon. Shira A. Scheindlin, U.S. District Court for the Southern District of New York.

Ms. Robertson graduated from State University of New York at Binghamton, *magna cum laude* with a B.A. in Philosophy, Politics and Law. She earned her J.D. from the Benjamin N. Cardozo School of Law, where she served as Notes Editor of the Cardozo Public Law, Policy and Ethics Journal.

Prior to attending law school, Ms. Robertson worked on the campaign committee of Councilman John Liu, the first Asian American to be elected to New York City's City Council.

Eric Schachter

A.B. Data, Ltd.
Eschachter@abdata.com
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Based in A.B. Data's Milwaukee, Wisconsin headquarters, Eric works closely with the client services team to develop and expand on strategies of administration for each case. With more than 15 years' experience, he provides A.B. Data with in-depth knowledge that pushes the envelope to stay ahead of the curve of this ever-changing industry.

Eric has successfully managed many high profile class action settlement administrations, with specific expertise in securities, antitrust and consumer class action settlements. Some of the more prominent administrations he has directed include:

- *Kleen Products LLC et al., v. International Paper, et al.* ($354 million settlement)
- *Wyatt v. El Paso* ($250 million settlement)
- *Minneapolis Firefighters' Relief Association v. Medtronic, Inc.* ($85 million settlement)
- *The Department of the Treasury of the State of New Jersey and its Division of Investment v. Cliffs Natural Resources Inc., et al* ($84 million settlement)
- *In re Mutual Funds Investment Litigation – Alliance Sub-Track* ($74 million settlement)
- *In re: Capacitors Antitrust Litigation* (over $50 million in settlements)
- *In re NII Holdings, Inc., Securities Litigation* ($42 million settlement)
- *Forsta AP-Fonden, et al. v. St. Jude Medical, Inc., et al.* ($39 million settlement)
- *In re Facebook, Inc., IPO Securities and Derivative Litigation* (($27 million settlement)
- *Shannon Mahoney v. Endo Health Solutions, Inc. et al.* ($16 million settlement)

Eric has also joined in the development of many technological advances and achievements within A.B. Data, concentrating on productivity, accuracy and above all else, what is best for A.B. Data's clients. The CLE program, "Innovations to Enhance & Energize the Notice, Claims & Fund Distribution Process," was developed by Eric and he has shared it with dozens of attorneys to provide insight on notice and claims administration best practices.

Eric is a highly regarded speaker and testifying expert on class action administration matters. He has provided testimony to courts in support of class action notice programs and related matters in dozens of cases and is a regular participant and speaker at industry events and conferences.

He has a Bachelor's degree in sociology from Syracuse University, and earned his law degree at Hofstra University School of Law. Prior to joining the notice and claims administration field, Eric litigated securities and antitrust class actions with Labaton Sucharow LLP in New York.

Professor Adam Zimmerman
Loyola Law School, Los Angeles

Adam Zimmerman teaches Civil Procedure, Torts, Administrative Law, Mass Tort Law, and Complex Litigation. Professor Zimmerman's teaching methods have been featured in the national news media. He was named Best New Law Professor in 2011 and Professor of the Year in 2013 by the St. John's Student Bar Association.

Professor Zimmerman's scholarship explores the way class action attorneys, regulatory agencies and criminal prosecutors provide justice to large groups of people through overlapping systems of tort law, administrative law and criminal law. His recent articles have been accepted for publication in the *Columbia Law Review*, *Duke Law Journal*, *New York University Law Review*, *University of Pennsylvania Law Review, Virginia Law Review,* and the *Yale Law Journal*. In 2016, the federal government adopted Zimmerman's recommendations to permit class actions in administrative hearings based on findings that appear in his forthcoming article in the Yale Law Journal, *Inside the Agency Class Action*.

Professor Zimmerman graduated *magna cum laude* from Georgetown University Law, where he served as Associate Editor of the Georgetown Law Journal and co-founded the first student chapter of the American Constitutional Society in the country. After graduation, he clerked for Judge Jack B. Weinstein in the Eastern District of New York. He then served as counsel to Special Master Kenneth R. Feinberg in the design and administration of the September 11th Victim Compensation Fund. Afterwards, he was associated with Orrick, Herrington & Sutcliffe LLP, where he represented clients in complex commercial litigation and mass tort cases, as well as domestic and international arbitration. As a practitioner, Professor Zimmerman has also worked on global class actions involving the tobacco industry, gun manufacturers, and Agent Orange.

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Major Class Action Developments (April 2019)

Adam S. Zimmerman

Loyola Law School

Major Class Action Developments

Adam S. Zimmerman
Professor of Law & Gerald Rosen Fellow
Loyola Law School, Los Angeles
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June 2019

I. Current Supreme Court Term and Major Developments in Class Action Rulemaking

A. Uptick of Class Action Cases Decided By Supreme Court in Last Decade

B. Current Term No Exception:
1. *Frank v. Gaos* (Cy Pres/Standing)
2. *Lamps Plus v. Varela* (Arbitration)
3. *Home Depot USA v. Jackson* (Class Action Fairness Act)
4. *Nutraceutical Corp. v. Lambert* (Interlocutory appeals under Rule 23(f))
5. New Cert. Petitions of Interest

C. New and Contemplated Rule Changes
1. New Rule 23 Amendments
2. Study Groups for Multidistrict Litigation and Litigation Funding
3. Local Rulemaking (Northern District of California Class Action Rules)
4. Proposed, But Stalled, Legislation
   a) HR 985 (Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017)
   b) HR 1423 (Forced Arbitration Injustice Repeal Act of 2019)

II. Class Actions and Forum Selection

A. Personal Jurisdiction
1. Background
   a) Philips Petroleum v. Shutts (1985)
   b) Daimler v. Bauman (2014)
   c) Bristol Myers Squibb v. Superior Court (2017)
   d) Rule 4(k) of the Federal Rules of Civil Procedure

2. Personal Jurisdiction in Federal Class Actions After *Bristol Myers*
   a) Questions of personal jurisdiction have split lower district courts
   b) Cases to watch:
      - *Molock v. Whole Foods Mkt., Inc*. (D.C. Cir. 2019)
      - *Cruson v. Jackson Nat'l Life Ins.* (5th Cir. 2019)

B. Class Action Fairness Act: State or Federal Court
1. Removing Class Actions Under CAFA
   a) Dart Cherokee Basin Operating Co., LLC v. Owens (2014)
   b) Standard Fire v. Knowles (2013)

2. Removing Mass Actions Under CAFA
   a) Abbott Laboratories, Inc., 698 F. 3d 568 (7th Cir. Oct. 16, 2012)
   b) Atwell v. Boston Scientific Corp., 740 F.3d 1160 (8th Cir. 2013)
   c) Koral v. Boeing Co., 628 F.3d 945 (7th Cir. 2011)
   d) Corber v. Xanodyne Pharm., Inc., 771 F.3d 1218 (9th Cir. 2014)

3. Local Controversy and Other CAFA Exceptions
   a) Brinkley v. Monterey Fin. Servs., 873 F.3d 1118 (9th Cir. 2017)
   b) *Roppo v. Travelers Comm. Ins. Co.,* 869 F.3d 568 (7th Cir. 2017)
   c) *Mason v. Lockwood, Andrews & Newnam,* 842 F.3d 383 (6th Cir. 2016)
4. CAFA in State Attorney General Actions and Other Class Alternatives
   a) *Miss. Ex rel. Hood v. AU Optronics Corp*. (2014)
   b) Baumann v. Chase Inv. Servs. Corp., 747 F.3d 1117 (9th Cir. 2014)

C. Arbitration
1. Background
   a) AT&T Mobility v. Concepcion (2011)
   b) *American Express v. Italian Colors Restaurant* (2013)
   c) DirectTV, Inc. v. Imburgia (2015)

2. Court Rejects Efforts to Commence Class Actions Under FAA
   a) Kindred Nursing Centers, L.P. v. Clark (2017)
   b) Epic Sys. Corp. v. Lewis (2018)
   c) Lamps Plus v. Varela (2019)

3. What's Left After *Epic* for Aggregate Litigation?

a) "Case specific" challenges (Hayes v. Delbert Svcs. Corp., 811 F.3d 666 (4th Cir. 2016))

b) State Attorney General and Qui-Tam Suits

c) Regulatory Approaches

- Many Obama-Era Regulations of Arbitration Rolled Back
- SEC and Mandatory Shareholder Arbitration
- Exception: Department of Education Rules and Guidance, *available at* https://ifap.ed.gov/eannouncements/030719GuidConcernProv2016BorrowerDefensetoRypmtRegs.html

d) Mass Arbitration of Claims—O'Connor v. Uber (9th Cir. 2018).

III. Article III Standing

A. Background

1. *Deposit Guar. Nat'l Bank of Jackson v. Roper* (1980)
2. *United States Parole Comm'n v. Geraghty* (1980)
3. *Lewis v. Continental Bank* (1990)
4. *Genesis Healthcare Corp. v. Symczyk* (2013)

B. Revisiting Class Actions and Article III

1. *Spokeo v. Robins* (2016)
2. *Campbell-Ewald Co. v. Gomez* (2016)
3. *Microsoft v. Baker* (2017) (concurring opinion)

C. "Functional" Class Actions and Article III

1. *United States v. Sanchez-Gomez* (2018)
2. *Monk v. Shulkin* (Fed. Cir. 2017)

IV. Emerging Certification Issues

A. Commonality and Predominance Under *Wal-Mart v. Dukes*

B. Commonality for Rule 23(b)(2) Injunctive Relief Classes

1. *Jennings v. Rodriguez* (2018)
2. Government and Institutional Classes after *Jennings*

C. Commonality and Predominance for Rule 23(b)(3) Damage Classes

1. *Tyson Foods v. Bouaphakeo* (2016)
2. *Brown v. Nucor* (4th Cir. 2015)
3. *In Re Asacol Antitrust Litigation* (1st Cir. 2018)

D. Issue Classes Under Rule 23(c)(4)

1. *Castano v. American Tobacco*, 84 F.3d 734 (5th Cir. 1996)
2. *McReynolds v. Merrill Lynch*, 672 F.3d 482 (7th Cir. 2012)
3. *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014)
4. *Martin v. Behr Dayton Thermal.* 2018 WL 3421711 (6th Cir. 2018)
5. Civil Rules Advisory Committee

E. Ascertainability

1. Heightened Approach
    a) *Carrera v. Bayer Corp.,* 727 F.3d 300 (3d Cir. 2013)
    b) *EQT Prod. Co. v. Adair,* 764 F.3d 347, 358 (4th Cir. 2014)

2. Rejection and Relaxation of Ascertainability
    a) *Mullins v. Direct Digital, LLC,* 795 F.3d 654 (7th 2015)
    b) *Briseno v. ConAgra Foods, Inc.,* 844 F.3d 1121 (9th Cir. 2017)
    c) *Sandusky Wellness Ctr., LLC, v. Medtox Sci., Inc., 821 F.3d 992* (8th Cir. 2016)
    d) *Cole v. City of Memphis,* 839 F.3d 530 (6th Cir. 2016)

3. Retreat/Rapproachment
    a) *Byrd v. Aaron's Inc.,* 784 F.3d 154 (3d Cir. 2015)
    b) *In re Petrobras Securities,* 862 F.3d 250 (2d Cir. 2017)
    c) *Civil Rules Advisory Committee no longer weighing in*

F. Securities Class Actions

1. *Halliburton Co. v. Erica P. John Fund, Inc* (2014)
2. *Ark. Teachers Ret. Sys v. Goldman Sachs Group, Inc.*, 879 F.3d 474 (2d Cir. 2018)
3. *Cyan, Inc. v. Beaver Cty. Emples. Ret. Fund* (2018)

V. Settlement

A. Standards for Settlement Classes: Do Differences in State Law Matter?

1. *Sullivan v. DB Investments Inc.*, 667 F.3d 273 (3d Cir. 2011)
2. *In re Hyundai & Kia Fuel Economy Litig.*, 881 F.3d 679 (9th Cir. 2018)

B. Settlement Do's and Don'ts

1. *Eubank v. Pella Corp.*, 2014 U.S. App. LEXIS 10332 (7th Cir. 2014)
2. *In re Logitech v. United States District Court for the Northern District of California* (9th Cir. 2019)(reviewing district judges local rule barring settlement negotiations before class certification)

C. Cy Pres

1. *Lane* v. *Facebook, Inc.* (2013)(Roberts, C.J., respecting denial of cert.)
2. *Frank v. Gaos,* 586 U.S. _ (2019)
3. U.S. and State Attorney General involvement
4. Federal Trade Commission Study of Consumer Class Action Distributions

D. Rule 23 Amendments for Class Action Settlements

VI. Trends and Proposed Reforms to Multidistrict Litigation

A. Purpose and History of MDLs

B. Pros and Cons of MDLs

C. Civil Advisory Committee Study of MDLs Appears to Have Narrowed Focus

D. Techniques for Managing MDLs

1. Fact sheets
2. *Lone Pine* orders --- HR 985
3. Advanced discovery
4. Bellwether Trials/Bellwether Mediation
5. Bifurcation
6. Management of attorney fees

NOTES

2

Innovations to Enhance and Energize the Notice, Claims, and Fund Distribution Process (March 22, 2019)

Eric Schachter

A.B. Data, Ltd.

I. INCREASING JUDICIAL SCRUTINY OF NOTICE AND SETTLEMENT ADMINISTRATION ISSUES

a. Northern District of California Procedural Guidance for Class Action Settlements

   i. Settlement Administrator bid process and working history

   ii. Projected administrative costs

   iii. Utilize social media/marketing specialists for notice

b. Rule 23 Amendments

   i. Notice by electronic means

c. "Nutrition Tables"

II. SETTLEMENT ADMINISTRATION IN THE DIGITAL AGE

a. Digital Notice

   i. Email Addresses

   ii. Digital Microtargeting

      1. Social Media

      2. Search Ads

      3. Websites

b. Online/Digital Claims

   i. Auto-validations

   ii. Documentation requirements

c. Digital Communications with Class Members

   i. Social Media

   ii. Direct Messages

   iii. Artificial Intelligence Chats

d. Digital Payments

   i. Mobile Phone/Email Address

   ii. Quasi-cash options becoming ubiquitous

III. PROS AND CONS OF NEW MEDIA OPTIONS IN CLASS NOTICE

a. Pros

   i. Align with current consumer expectations

   ii. Reduce costs

   iii. Increase claim rates

   iv. Compress settlement administration timeline

   v. Increase transparency for counsel and the Court

b. Cons

   i. Judicial acceptance/precedence?

   ii. Non-technological demographics

   iii. Smaller classes

NOTES

NOTES

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Nutrition Tables, *In re: Massey Energy Co. Sec. Litig.*, No. 10-cv-00689 (S.D. W.V. 2018)

Submitted by:
Eric Schachter
A.B. Data, Ltd.

Preapproval Stage

***In re Massey Energy Co. Sec. Litig.*,**
10-cv-00689 (S.D. W.V.)
All figures are best estimates as of the date of the final approval motion

	% Total Settlement
Settlement $265 million	**100%**
Est. Net Settlement Fund*	**NA**
Expected Claims	UKN
Class members	UKN
Projected claims	UKN
Recovery per share**	$3.34
Expected Residual $0-$20,000	0%
Cy pres $0-$20,000	
Reversion $0	
Estimated Attorney Fees $31,838,168	**12%**
Lodestar $11,085,145	
Hours 21,800	
Average billing rate $509/hr	
Multiplier 2.9	
Estimated Attorney Costs $592,550	**0.2%**
Est. Administrative Costs*	**N/A**

***Not estimated.**
****Recovery per share is based on consulting expert's estimate of number of damaged shares. Actual individual payments per share may be higher or lower depending on factual circumstances.**

Postclaim Filing Audit

***In re Massey Energy Co. Sec. Litig.*,**
10-cv-00689 (S.D. W.V.)
All figures are actual amounts as of January 16, 2018

	% Total Settlement
Settlement $265,142,908*	**100%**
Claims Paid $231,990,181	**87.5%**
Class members sent notice 235,497	
Actual claims 37,060 (6.4%)	
Opt-outs 1 (0.00042%)	
Mean recovery (per eligible claimant) $29,523**	
Residual $57,659***	**0.02%**
Cy pres distribution $0	
Reversion $0	
Attorney Fees Awarded $31,838,168	**12%**
Portion of distributed fund 13.7%	
Attorney Costs Awarded $592,550	**0.22%**
Portion of distributed fund 0.3%	
Lead Plaintiff Award $33,889	**0.01%**
Administrative Costs $630,461	**0.2%**

***Includes interest.**
****Median recovery not available.**
*****Subject to additional distribution/application to unpaid administrative costs**

NOTES

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United States District Court, Northern District of California, Procedural Guidance for Class Action Settlements (Updated December 5, 2018)

Submitted by:
Eric Schachter
A.B. Data, Ltd.

Procedural Guidance for Class Action Settlements

Updated November 1, 2018 and December 5, 2018

> ***NOTE**: This updated guidance, first published November 1, 2018, was modified December 5, 2018 to include the following clarification: the first sentence of the guidance has been revised to reflect that even though the guidance is highly recommended, the parties must comply in the first instance with the specific orders of the presiding judge.*

Parties submitting class action settlements for preliminary and final approval in the Northern District of California should review and follow these guidelines to the extent they do not conflict with a specific judicial order in an individual case. Failure to address the issues discussed below may result in unnecessary delay or denial of approval. Parties should consider this guidance during settlement negotiations. Parties should also consider the suggested language below when drafting class notices. In cases litigated under the Private Securities Litigation Reform Act of 1995, follow the statute and case law requirements that apply to such cases, such as regarding reasonable costs and expenses awards to representative plaintiffs, and this procedural guidance to the extent applicable.

Preliminary Approval

1) INFORMATION ABOUT THE SETTLEMENT—The motion for preliminary approval should state, where applicable:

a. If a litigation class has not been certified, any differences between the settlement class and the class proposed in the operative complaint and an explanation as to why the differences are appropriate in the instant case.

b. If a litigation class has been certified, any differences between the settlement class and the class certified and an explanation as to why the differences are appropriate in the instant case.

c. If a litigation class has not been certified, any differences between the claims to be released and the claims in the operative complaint and an explanation as to why the differences are appropriate in the instant case.

d. If a litigation class has been certified, any differences between the claims to be released and the claims certified for class treatment and an explanation as to why the differences are appropriate in the instant case.

e. The anticipated class recovery under the settlement, the potential class recovery if plaintiffs had fully prevailed on each of their claims, and an explanation of the factors bearing on the amount of the compromise.

f. The proposed allocation plan for the settlement fund.

g. If there is a claim form, an estimate of the number and/or percentage of class members who are expected to submit a claim in light of the experience of the selected claims administrator and/or counsel from other recent settlements of similar cases, the identity of the examples used for the estimate, and the reason for the selection of those examples.

h. In light of Ninth Circuit case law disfavoring reversions, whether and under what circumstances money originally designated for class recovery will revert to any defendant, the potential amount or range of amounts of any such reversion, and an explanation as to why a reversion is appropriate in the instant case.

2) SETTLEMENT ADMINISTRATION—In the motion for preliminary approval, the parties should identify the proposed settlement administrator, the settlement administrator selection process, how many settlement administrators submitted proposals, what methods of notice and claims payment were proposed, and the lead class counsel's firms' history of engagements with the settlement administrator over the last two years. The parties should also address the anticipated administrative costs, the reasonableness of those costs in relation to the value of the settlement, and who will pay the costs. The court may not approve the amount of the cost award to the settlement administrator until the final approval hearing.

3) NOTICE—The parties should ensure that the class notice is easily understandable, taking into account any special concerns about the education level or language needs of the class members. The notice should include the following information: (1) contact information for class counsel to answer questions; (2) the address for a website, maintained by the claims administrator or class counsel, that has links to the notice, motions for approval and for attorneys' fees and any other important documents in the case; (3) instructions on how to access the case docket via PACER or in person at any of the court's locations. The notice should state the date of the final approval hearing and clearly state that the date may change without further notice to the class. Class members should be advised to check the settlement website or the Court's PACER site to confirm that the date has not been changed. The notice distribution plan should be an effective one.

Class counsel should consider the following ways to increase notice to class members: identification of potential class members through third-party data sources; use of social media to provide notice to class members; hiring a marketing specialist; providing a settlement website that estimates claim amounts for each specific class member and updating the website periodically to provide accurate claim amounts based on the number of participating class members; and distributions to class members via direct deposit.

The notice distribution plan should rely on U.S. mail, email, and/or social media as appropriate to achieve the best notice that is practicable under the circumstances, consistent with Federal Rule of Civil Procedure 23(c)(2). If U.S. mail is part of the notice distribution plan, the notice envelope should be designed to enhance the chance that it will be opened.

Below is suggested language for inclusion in class notices:

> This notice summarizes the proposed settlement. For the precise terms and conditions of the settlement, please see the settlement agreement available at www.______________.com, by contacting class counsel at _________________, by accessing the Court docket in this case, for a fee, through the Court's Public Access to Court Electronic Records (PACER) system at https://ecf.cand.uscourts.gov, or by visiting the office of the Clerk of the Court for the United States District Court for the Northern District of California, *[insert appropriate Court location here]*, between 9:00 a.m. and 4:00 p.m., Monday through Friday, excluding Court holidays.
>
> PLEASE DO NOT TELEPHONE THE COURT OR THE COURT CLERK'S OFFICE TO INQUIRE ABOUT THIS SETTLEMENT OR THE CLAIM PROCESS.

4) OPT-OUTS—The notice should instruct class members who wish to opt out of the settlement to send a letter, setting forth their name and information needed to be properly identified and to opt out of the settlement, to the settlement administrator and/or the person or entity designated to receive opt outs. It should require only the information needed to opt out of the settlement and no extraneous information. The notice should clearly advise class members of the deadline, methods to opt out, and the consequences of opting out.

5) OBJECTIONS—Objections must comply with Federal Rule of Civil Procedure 23(e)(5). The notice should instruct class members who wish to object to the settlement to send their written objections only to the court. All objections will be scanned into the electronic case docket and the parties will receive electronic notices of filings. The notice should make clear that the court can only approve or deny the settlement and cannot change the terms of the settlement. The notice should clearly advise class members of the deadline for submission of any objections.

Below is suggested language for inclusion in class notices:

> "You can ask the Court to deny approval by filing an objection. You can't ask the Court to order a different settlement; the Court can only approve or reject the settlement. If the Court denies approval, no settlement payments will be sent out and the lawsuit will continue. If that is what you want to happen, you must object.
>
> Any objection to the proposed settlement must be in writing. If you file a timely written objection, you may, but are not required to, appear at the Final Approval Hearing, either in person or through your own attorney. If you appear through your own attorney, you are responsible for hiring and paying that attorney. All written objections and supporting papers must (a) clearly identify the case name and number (__________ v. ___________, Case Number ___________), (b) be submitted to the Court either by mailing them to the Class Action Clerk, United States District Court for the Northern District of California, *[insert appropriate Court location here]*, or by filing them in person at any location of the United States District Court for the Northern District of California, and (c) be filed or postmarked on or before __________________."

6) ATTORNEYS' FEES—The court will not approve a request for attorneys' fees until the final approval hearing, but class counsel should include information about the fees they intend to request and their lodestar calculation in the motion for preliminary approval. In a common fund case, the parties should include information about the relationship among the amount of the award, the amount of the common fund, and counsel's lodestar calculation. To the extent counsel base their fee request on having obtained injunctive relief and/or other non-monetary relief for the class, counsel should discuss the benefit conferred on the class. Counsel's lodestar calculation should include the total number of hours billed to date and the requested multiplier, if any. Additionally, counsel should state whether and in what amounts they seek payment of costs and expenses, including expert fees, in addition to attorneys' fees.

7) INCENTIVE AWARDS—Judges in this district have different perspectives on extra payments to named plaintiffs or class representatives that are not made available to other class members. Counsel seeking approval of incentive awards should consult relevant prior orders by the judge reviewing the request. The court will not approve a request for incentive awards until the final approval hearing, but the parties should include information about the incentive awards they intend to request as well as the evidence supporting the awards in the motion for preliminary approval. The parties should ensure that neither the size nor any conditions placed on the incentive awards undermine the adequacy of the named plaintiffs or class representatives. In general, unused funds allocated to incentive awards should be distributed to the class pro rata or awarded to cy pres recipients.

8) CY PRES AWARDEES—If the settlement contemplates a cy pres award, the parties should identify their chosen cy pres recipients, if any, and how those recipients are related to the subject matter of the lawsuit and the class members. The parties should also identify any relationship they or their counsel have with the proposed cy pres recipients. In general, unused funds allocated to attorneys' fees, incentive awards, settlement administration fees and payments to class members should be distributed to the class pro rata or awarded to cy pres recipients.

9) TIMELINE—The parties should ensure that class members have at least thirty-five days to opt out or object to the settlement and the motion for attorney's fees and costs.

10) CLASS ACTION FAIRNESS ACT (CAFA)—The parties should address whether CAFA notice is required and, if so, when it will be given. In addition the parties should address substantive compliance with CAFA. For example, if the settlement includes coupons, the parties should explain how the settlement complies with 28 U.S.C. § 1712.

11) PAST DISTRIBUTIONS—Lead class counsel should provide the following information for at least one of their past comparable class settlements (i.e. settlements involving the same or similar clients, claims, and/or issues):

a. The total settlement fund, the total number of class members, the total number of class members to whom notice was sent, the method(s) of notice, the number and percentage of claim forms submitted, the average recovery per class member or claimant, the amounts distributed to each cy pres recipient, the administrative costs, and the attorneys' fees and costs.

b. In addition to the above information, where class members are entitled to non-monetary relief, such as discount coupons or debit cards or similar instruments, the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests. Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the class.

Counsel should summarize this information in easy-to-read charts that allow for quick comparisons with other cases.

12) ELECTRONIC VERSIONS—Electronic versions (Microsoft Word or WordPerfect) of all proposed orders and notices should be submitted to the presiding judge's Proposed Order (PO) email address when filed. Most judges in this district use Microsoft Word, but counsel should check with the individual judge's Courtroom Deputy.

Final Approval

1) CLASS MEMBERS' RESPONSE—The motion for final approval briefing should include information about the number of undeliverable class notices and claim packets, the number of class members who submitted valid claims, the number of class members who elected to opt out of the class, and the number of class members who objected to or commented on the settlement. In addition, the motion for final approval should respond to any objections.

2) ATTORNEYS' FEES—All requests for approval of attorneys' fees must include detailed lodestar information, even if the requested amount is based on a percentage of the settlement fund. Declarations of class counsel as to the number of hours spent on various categories of activities related to the action by each biller, together with hourly billing rate information may be sufficient, provided that the declarations are adequately detailed. Counsel should be prepared to submit copies of billing records themselves at the court's order.

Regardless of when they are filed, requests for attorneys' fees must be noticed for the same date as the final approval hearing. If the plaintiffs choose to file two separate motions, they should not repeat the case history and background facts in both motions. The motion for attorneys' fees should refer to the history and facts set out in the motion for final approval.

3) INCENTIVE AWARDS—All requests for incentive awards must be supported by evidence of the proposed awardees' involvement in the case and other justifications for the awards.

4) ELECTRONIC VERSIONS—Electronic versions (Microsoft Word or Word Perfect) of all proposed orders and judgments should be submitted to the presiding judge's Proposed Order (PO) email address at the time they are filed.

Post-Distribution Accounting

1) Within 21 days after the distribution of the settlement funds and payment of attorneys' fees, the parties should file a Post-Distribution Accounting, which provides the following information:

a. The total settlement fund, the total number of class members, the total number of class members to whom notice was sent and not returned as undeliverable, the number and percentage of claim forms submitted, the number and percentage of opt-outs, the number and percentage of objections, the average and median recovery per claimant, the largest and smallest amounts paid to class members, the method(s) of notice and the method(s) of payment to class members, the number and value of checks not cashed, the amounts distributed to each cy pres recipient, the administrative costs, the attorneys' fees and costs, the attorneys' fees in terms of percentage of the settlement fund, and the multiplier, if any.

b. In addition to the above information, where class members are entitled to non-monetary relief, such as discount coupons, debit cards, or similar instruments, the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests. Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the class.

Counsel should summarize this information in an easy-to-read chart that allows for quick comparisons with other cases.

2) Within 21 days after the distribution of the settlement funds and award of attorneys' fees, the parties should post the Post-Distribution Accounting, including the easy-to-read chart, on the settlement website.

3) The Court may hold a hearing following submission of the parties' Post-Distribution Accounting.

NOTES

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Federal Rule of Civil Procedure 23 Amendment (2019)

Submitted by:
Eric Schachter
A.B. Data, Ltd.

(2) *Notice.*

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3) -- or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3) -- the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

* * * * *

NOTES

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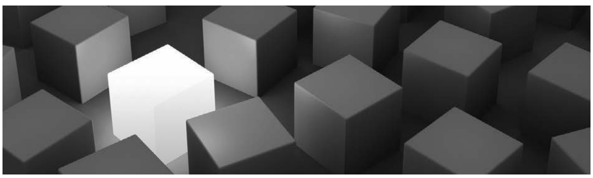
Stefan Boettrich and Svetlana Starykh, NERA Economic Consulting, Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review (January 29, 2019)

NERA
ECONOMIC CONSULTING

29 January 2019



Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review

Record Pace of Filings, Despite Slower Merger-Objection Growth
Average Case Size Surges to Record High
Settlement Values Rebound from Near-Record Lows

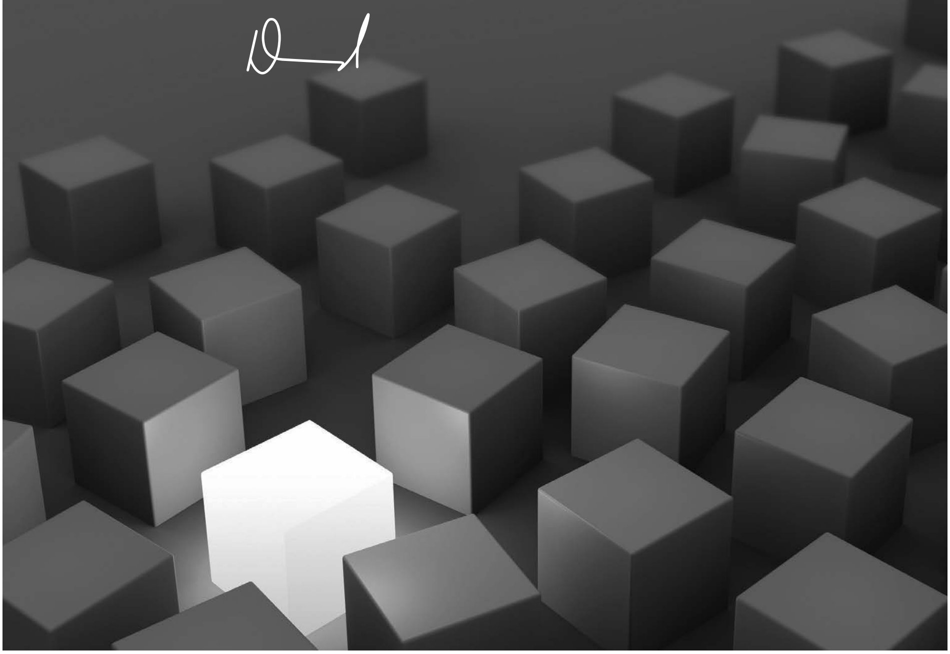
By Stefan Boettrich and Svetlana Starykh

Insight in Economics™

Foreword

I am excited to share NERA's *Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review* with you. This year's edition builds on work carried out over numerous years by many members of NERA's Securities and Finance Practice. In this year's report, we continue our analyses of trends in filings and settlements and present new analyses, such as how post-class-period stock price movements relate to voluntary dismissals. While space does not permit us to present all the analyses the authors have undertaken while working on this year's edition, or to provide details on the statistical analysis of settlement amounts, we hope you will contact us if you want to learn more about our work related to securities litigation. On behalf of NERA's Securities and Finance Practice, I thank you for taking the time to review our work and hope you find it informative.

Dr. David Tabak
Managing Director



Recent Trends in Securities Class Action Litigation: 2018 Full-Year Review

Record Pace of Filings, Despite Slower Merger-Objection Growth
Average Case Size Surges to Record High
Settlement Values Rebound from Near-Record Lows

By Stefan Boettrich and Svetlana Starykh[1]

29 January 2019

Introduction and Summary[2]

In 2018, the pace of securities class action filings was the highest since the aftermath of the 2000 dot-com crash, with 441 new cases. While merger objections constituted about half the total, filing growth of such cases slowed versus 2017, indicating that the explosion in filings sparked by the *Trulia* decision may have run its course.[3] Filings alleging violations of Rule 10b-5, Section 11, and/or Section 12 of the Securities Act of 1933 ("Securities Act") were roughly unchanged compared to 2017, but accelerated over the second half of the year, with the fourth quarter being one of the busiest on record.

The steady pace of new securities class actions masked fundamental changes in filing characteristics. Aggregate NERA-defined Investor Losses, a measure of total case size, came to a record $939 billion, nearly four times the preceding five-year average. Even excluding substantial litigation against General Electric (GE), aggregate Investor Losses doubled versus 2017. Most growth in Investor Losses stemmed from cases alleging issues with accounting, earnings, or firm performance, contrasting with prior years when most growth was tied to regulatory allegations. Filings against technology firms jumped nearly 70% from 2017, primarily due to cases alleging accounting issues or missed earnings guidance.

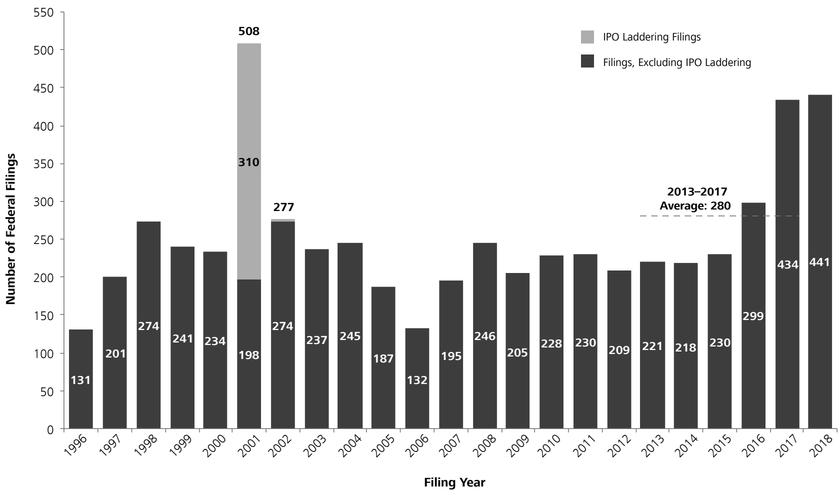
The average settlement value rebounded from the 2017 near-record low, mostly due to the $3 billion settlement against Petróleo Brasileiro S.A.—Petrobras. The median settlement nearly doubled, primarily due to higher settlements of many moderately sized cases. Despite a rebound in settlement values in 2018, the number of settlements remained low, with dismissals outnumbering settlements more than two-to-one. An adverse number of cases were voluntarily dismissed, which can partially be explained by positive returns of targeted securities during the PSLRA bounce-back periods. The robust rate of case resolutions has not kept up with the record filing rate, driving pending litigation up more than 6%.

Trends in Filings

Number of Cases Filed

There were 441 federal securities class actions filed in 2018, the fourth consecutive year of growth (see Figure 1). The filing rate was the highest since passage of the PSLRA, with the exception of 2001 when new IPO laddering cases dominated federal dockets. The dramatic year-over-year growth seen in each of the past few years resulted in a near doubling of filings since 2015, but growth moderated considerably in 2018 to 1.6%. The 2018 filing rate is well above the post-PSLRA average of approximately 253 cases per year, and solidifies a departure from the generally stable filing rate in the years following the 2008 financial crisis.

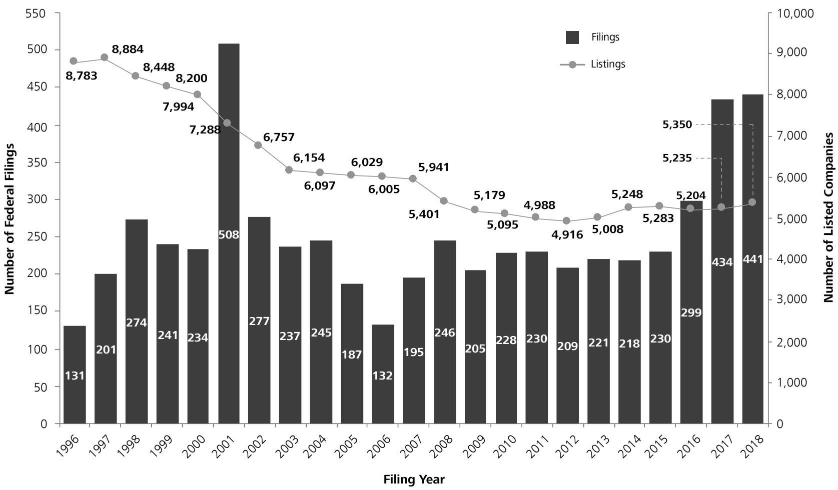
Figure 1. **Federal Filings**
January 1996–December 2018



As of November 2018, there were 5,350 companies listed on the major US securities exchanges (see Figure 2). The 441 federal securities class action suits filed in 2018 involved approximately 8.2% of publicly listed companies. The overall risk of litigation to listed firms has increased substantially since early in the decade, when only about 4.0% of public companies listed on US exchanges were subject to a securities class action.

Broadly, the chance of a publicly listed company being subject to securities litigation depends on the number of filings relative to the number of listed companies. While the number of listed companies has increased by 7% over the last five years, the longer-term trend is toward fewer listings. Since the passage of the PSLRA in 1995, the number of listings on major US exchanges has steadily declined by about 3,000, or nearly 40%. Recent research attributed this decline to fewer new listings and an increase in delistings, mostly through mergers and acquisitions.[4]

Figure 2. **Federal Filings and Number of Companies Listed in the United States**
January 1996–December 2018



Note: Listed companies include those listed on the NYSE and Nasdaq. Listings data from 2016 through 2018 were obtained from World Federation of Exchanges (WFE). The 2018 listings data is as of November 2018. Data for prior years was obtained from Meridian Securities Markets and WFE.

Despite the long-term drop in the number of listed companies, the average number of securities class action filings has *increased* from 216 per year over the first five years after the PSLRA to about 324 per year over the past five years. The long-term trend toward fewer listed companies coupled with more class actions implies that the average probability of a listed firm being subject to such litigation has increased from about 2.6% after passage of the PSLRA to 3.7% over the past five years, and 8.0% over the past two years.

Recently, the rising average risk of class action litigation was driven by dramatic growth in merger-objection cases that, prior to 2016, were mostly filed in various state courts. Since then, state court rulings have driven such litigation onto federal dockets. Hence the increase in the typical firm's litigation risk might be less than indicated above, since 1) the risk of merger-objection litigation is specific to firms planning or engaged in M&A activity and 2) many merger-objection cases would otherwise have been filed in state courts.

The average probability of a firm being targeted by what is often regarded as a "Standard" securities class action—one that alleges violations of Rule 10b-5, Section 11, and/or Section 12—was only 4.0% in 2018, albeit higher than the average probability of about 2.6% following the PSLRA and 3.5% between 2013 and 2017.

Filings by Type

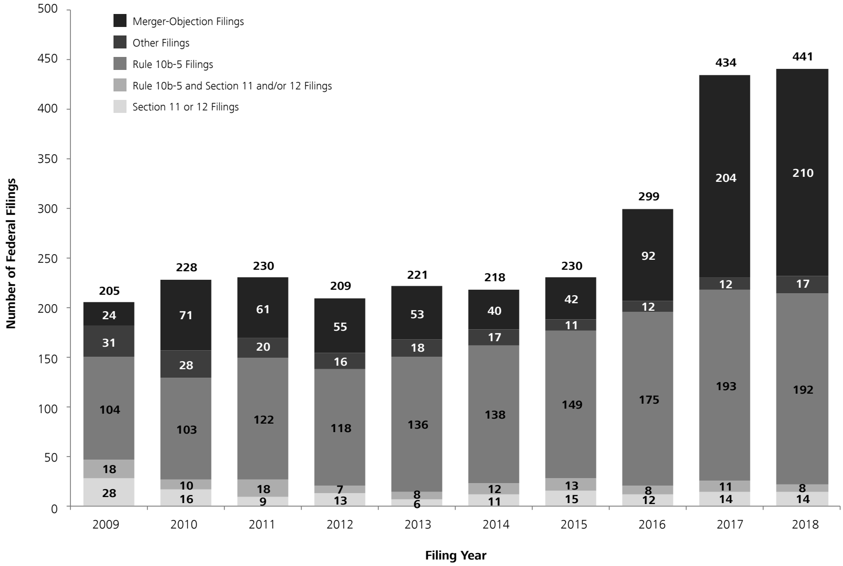
In 2018, the 441 securities class action filings were about evenly split between Standard securities class actions and merger objections, roughly matching the number seen in 2017 (see Figure 3). There were 214 Standard securities cases filed, down slightly from 2017. Prior to 2018, Standard filings grew for five consecutive years, the longest expansion on record, and by over 50% since 2013. Despite the slowdown in 2018, monthly filing growth over the second half of the year was robust, and capped by 64 filings in the fourth quarter, one of the busiest quarters on record.

Despite the 210 merger-objection filings in 2018 making up about half of all filings, yearly filing growth of such cases slowed to almost zero, as the number of filings roughly matched the level seen in 2017. The tepid filing growth implies that the rapid growth following various state-level decisions limiting "disclosure-only" settlements (including the *Trulia* decision) has likely run its course.[5] Rather, the stagnant growth in federal merger-objection filings was likely driven by relatively stagnant M&A activity.[6]

Although aggregate merger-objection filings (including those at the state level) may correspond with the rate of mergers and acquisitions, such deal activity does not appear to have historically been the primary driver of federal merger-objection filings over multiple years. The number of federal merger-objection filings generally fell between 2010 and 2015, despite increased M&A activity. The higher filing counts in 2016 and 2017 likely stemmed from trends in the choice of jurisdiction rather than trends in deal volume.[5]

Besides Standard and merger-objection cases, a variety of other filings rounded out 2018. Several filings alleged fraudulent initial coin and cryptocurrency offerings, manipulation of derivatives (e.g., VIX products and metals futures), and breaches of fiduciary duty (including client-broker disputes involving churning and improper asset allocation).

Figure 3. **Federal Filings by Type**
January 2009–December 2018



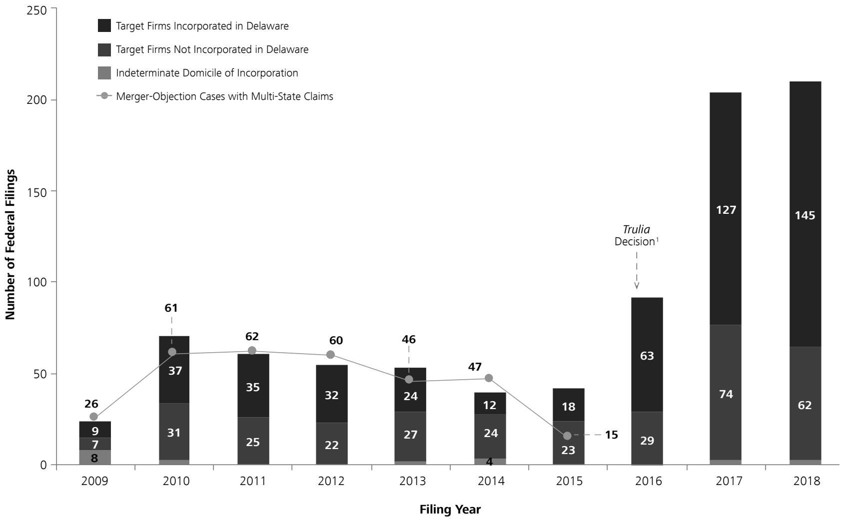
Merger-Objection Filings

In 2018, federal merger-objection filings were relatively unchanged versus 2017 (see Figure 4). Growth in federal merger-objection filings in 2016 and 2017 largely followed various state court rulings barring disclosure-only settlements, the most notable being the 22 January 2016 *Trulia* decision in the Delaware Court of Chancery.[7] Research suggested that such state court decisions would simply drive merger objections to alternative jurisdictions, such as federal courts.[8] This has largely been borne out thus far.

The dramatic slowdown in merger-objection filings growth implies that plaintiff forum selection is less of a growth factor; in 2018 and going forward, merger and acquisition activity will likely be the primary driver of federal merger-objection litigation. This assumes, however, that corporations don't increasingly adopt forum selection bylaws, and that federal courts don't increasingly follow the Delaware Court of Chancery's lead on rejecting disclosure-only settlements.[9] For instance, after the Seventh Circuit ruled strongly against a disclosure-only settlement in *In re: Walgreen Co. Stockholder Litigation*, the proportion of merger objections filed in that circuit fell by more than 60% the following year.[10]

Federal merger-objection filings typically allege a violation of Section 14(a), 14(d), and/or 14(e) of the Securities Exchange Act of 1934, and/or a breach of fiduciary duty by managers of a firm being acquired. Such filings are frequently voluntarily dismissed.

Figure 4. **Federal Merger-Objection Cases and Merger-Objection Cases with Multi-State Claims**
January 2009–December 2018



Notes: Counts of merger-objection cases with multi-state claims based on data obtained from Matthew D. Cain and Steven D. Solomon, "Takeover Litigation in 2015," Berkeley Center for Law, Business and the Economy, 14 January 2016. Data on multi-state claims unavailable for 2016–2018. State of incorporation obtained from the Securities and Exchange Commission.
[1] *In re Trulia, Inc. Stockholder Litigation*, C.A. No. 10020-CB (Del. Ch. Jan. 22, 2016).

Filings Targeting Foreign Companies

Foreign companies with securities listed on US exchanges have been disproportionately targeted in Standard securities class actions since 2010 (see Figure 5).[11] In 2018, foreign companies were targeted in about 25% fewer cases than in 2017, and in only about 20% of complaints, just above the share of listings. This contrasts with persistent growth in foreign firm exposure to securities litigation over the preceding four years.

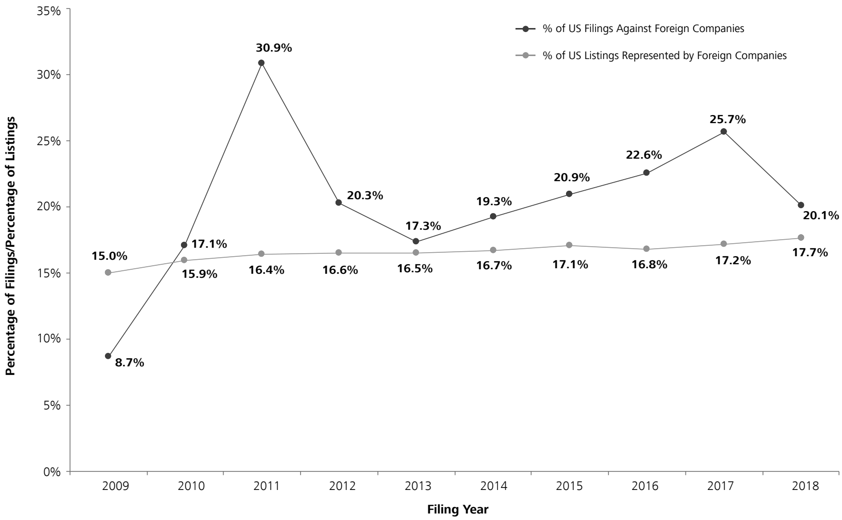
The reversion in claims against foreign firms mirrors a wider slowdown in filings with regulatory allegations. Over the last few years, growth in regulatory filings explained much of the growth in foreign filings, with 50% to 80% of new foreign cases including such allegations. That trend has reversed; in 2018, 75% of the drop in foreign filings stemmed from fewer claims related to regulation.

The slowdown in foreign regulatory filings can also be tied to fewer complaints in 2018 alleging similar regulatory violations, which adversely targeted foreign firms and particularly those domiciled in Europe. For instance, in 2017 there were multiple filings related to pharmaceutical price fixing, emissions defeat devices, and financing schemes by Kalani Investments Limited.

Filings against foreign companies spanned several economic sectors, led by a considerable jump against firms in the Electronic Technology and Technology Services sector (accounting issues were most common). Filings against foreign companies in the Health Technology and Services sector dropped by half. In past years, such filings usually claimed regulatory violations; none did in 2018.

In 2011, a record 31% of filings targeted foreign companies, mostly due to a surge in litigation against Chinese companies, which was mainly related to a proliferation in so-called "reverse mergers" years earlier. A reverse merger is a merger in which a private company merges with a publicly traded company listed in the US, thereby enabling access to US capital markets without going through the process of obtaining a new listing.

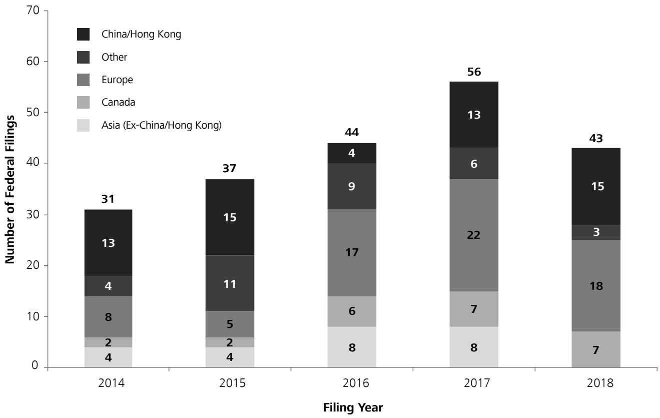
Figure 5. **Foreign Companies: Share of Filings and Share of Companies Listed on US Exchanges**
Shareholder Class Actions with Alleged Violations of Rule 10b-5, Section 11, and/or Section 12
January 2009–December 2018



Note: Foreign issuer status determined based on location of principal executive offices.

Internationally, only Chinese firms listed on US exchanges were subject to more securities class actions in 2018 than in 2017 (see Figure 6). Filings against European firms slowed, partially due to fewer regulatory filings. There were zero filings against Israeli companies, despite an increase in listings and litigation against such companies in previous years.

Figure 6. **Filings Against Foreign Companies**
Shareholder Class Actions with Alleged Violations of Rule 10b-5, Section 11, and/or Section 12 by Region
January 2014–December 2018



Note: Foreign issuer status determined based on location of principal executive offices.

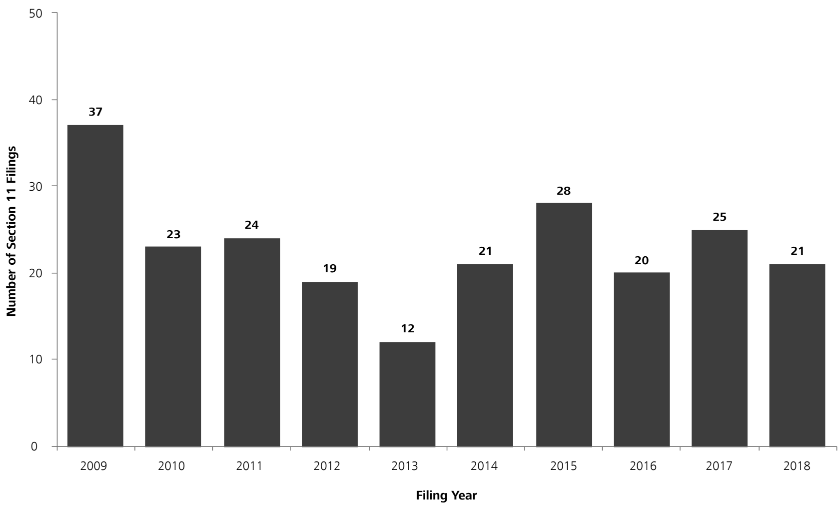
Section 11 Filings

There were 21 federal filings alleging violations of Section 11 in 2018, which approximates the five-year average (see Figure 7).

On 20 March 2018, the US Supreme Court ruled in *Cyan, Inc. v. Beaver County Employees Retirement Fund* that state courts have jurisdiction over class actions with claims brought under the Securities Act.[12] The ruling allows plaintiffs to litigate Section 11 claims in state courts, including plaintiff-friendly California state courts.

The full effect of the *Cyan* decision on federal filing trends remains to be seen, but of the 21 Section 11 filings in 2018, 14% involved firms headquartered in California, down from a quarter in 2016 (prior to the US Supreme Court granting certiorari). Of the three California firms, at least two have stated in filings with the SEC that claims under the Securities Act must only be brought in federal courts.[12]

Figure 7. **Section 11 Filings**
January 2009–December 2018



Aggregate NERA-Defined Investor Losses

In addition to the number of cases filed, we also consider the total potential size of these cases using a metric we label "NERA-defined Investor Losses."

NERA's Investor Losses variable is a proxy for the aggregate amount that investors lost from buying the defendant's stock, rather than investing in the broader market during the alleged class period. Note that the Investor Losses variable is not a measure of damages because any stock that underperforms the S&P 500 would have Investor Losses over the period of underperformance; rather, it is a rough proxy for the relative size of investors' potential claims. Historically, Investor Losses have been a powerful predictor of settlement size. Investor Losses can explain more than half of the variance in the settlement values in our database.

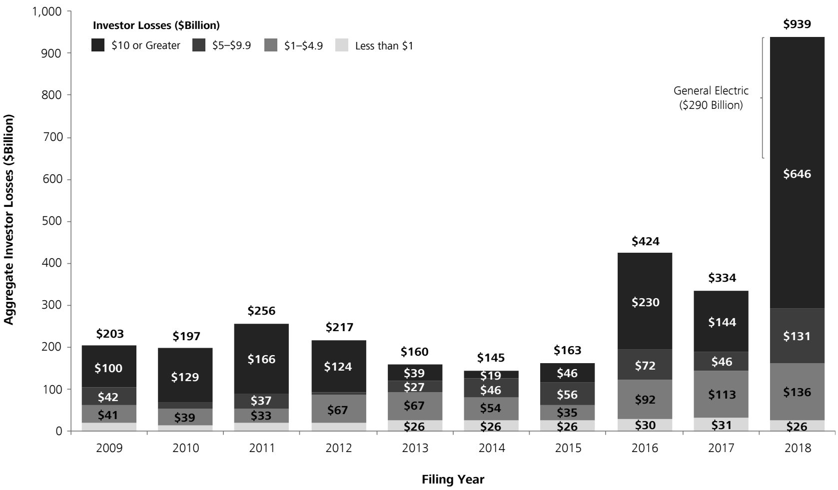
We do not compute NERA-defined Investor Losses for all cases included in this publication. For instance, class actions in which only bonds and not common stock are alleged to have been damaged are not included. The largest excluded groups are IPO laddering cases and merger-objection cases.

Despite a relatively constant rate of Standard filings in 2018, the size of those filings (as measured by NERA-defined Investor Losses) surged to nearly $1 trillion (see Figure 8). Total Investor Losses were dominated by litigation against GE, equal to about 45% of Investor Losses from all other cases combined, an especially impressive metric given the record aggregate case size.

NERA-defined Investor losses in 2018 totaled $939 billion, more than double that of any prior year and nearly four times the preceding five-year average of $245 billion. The total size of filings in all but the smallest strata grew, led by cases with more than $10 billion in Investor Losses. Coupled with the relatively stable overall filing rate, this suggests a systematic shift toward larger filings. In 2018, there were a record number of filings in each of the three largest strata, while only 88 cases had Investor Losses less than $1 billion, a record low.

Once again, there were several very large filings alleging regulatory violations, including a stock drop case against Johnson & Johnson related to claims of allegedly carcinogenic talcum powder, and a data privacy case against Facebook. Besides cases alleging regulatory violations, other very large cases included a filing against NVIDIA regarding excess inventory of GPUs (used for cryptocurrency mining) and large drug development cases against Bristol-Myers Squibb and Celgene.

Figure 8. **Aggregate NERA-Defined Investor Losses**
Shareholder Class Actions with Alleged Violations of Rule 10b-5, Section 11, and/or Section 12
January 2009–December 2018



Over the past couple of years, growth in aggregate Investor Losses was concentrated in filings alleging regulatory violations, a substantial number of which were also *event-driven* securities cases (i.e., stock drop cases stemming from a specific event or occurrence). Between 2015 and 2017, growth in the total size of regulatory cases was due to an increased filing rate (from 31 to 57 cases) and higher median Investor Losses (from $308 million to $811 million).

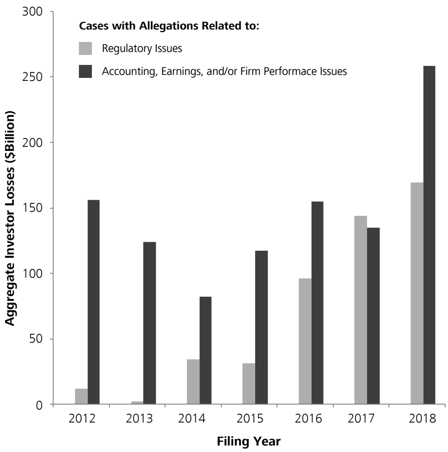
In 2018, regulatory cases were again large (half had Investor Losses greater than $4 billion), but the vast majority of total Investor Losses stemmed from what have historically been more typical securities cases, namely those that allege accounting issues, misleading earnings guidance, and/or firm performance issues.[14] This was led by litigation related to accounting issues at GE. Excluding GE, aggregate Investor Losses of such cases nearly doubled to a record $258 billion (see Figure 9).

Growth in the total size of cases alleging accounting, earnings, and/or performance issues primarily stems from growth in individual case size, as opposed to more filings. The median case with such allegations had more than $650 million in Investor Losses, about twice the average of $322 million over the preceding five years.

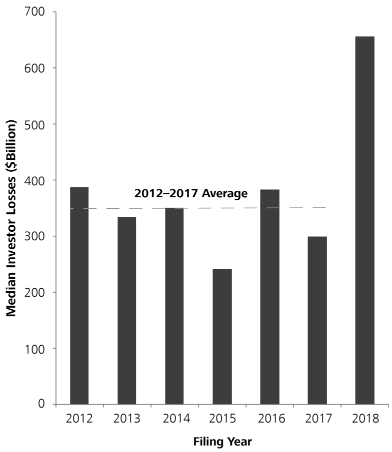
Details of the size of cases with specific types of allegations are discussed in the *Allegations* section below.

Figure 9. **NERA-Defined Investor Losses**
Filings Alleging Accounting Issues, Missed Earnings Guidance, and/or Misleading Future Performance
Excludes 2018 GE Filings

Aggregate NERA-Defined Investor Losses
January 2012–December 2018



Median NERA-Defined Investor Losses
January 2012–December 2018



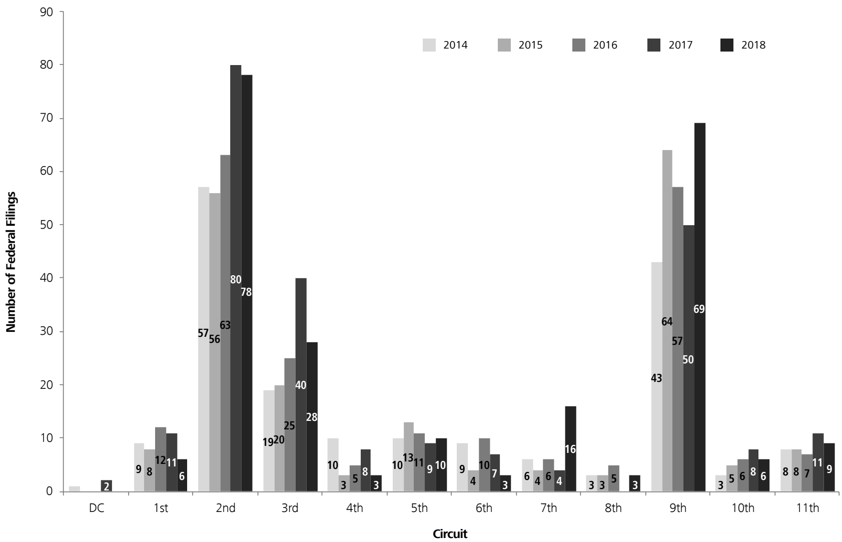
Note: Regulatory cases with parallel accounting, performance, or missed earnings claims are excluded.

Filings by Circuit

Filings in 2018 (excluding merger objections) were again concentrated in the Second and Ninth Circuits. The concentration of filings in these circuits has increased in 2018, during which they received 64% of filings, up from an average of 57% over the prior two years (see Figure 10). While the Second Circuit received the most filings, the most growth was in the Ninth Circuit, which includes Silicon Valley, mostly due to more litigation against firms in the Electronic Technology and Technology Services sector.

Merger-objection filings, not included in Figure 10, have become increasingly active in the Third Circuit, which includes Delaware. The Third Circuit received 82 merger-objection cases in 2018, double the number in 2017 and more than an eightfold increase over 2016. Nearly four-in-ten merger-objection cases were filed in the Third Circuit, twice the concentration of 2017 and coming amidst only a slight increase in the percentage of target firms incorporated in Delaware (see Figure 4). This corresponds with a decline in filings in every other circuit except the Second Circuit, where filings increased from 15 to 26.

Figure 10. **Federal Filings by Circuit and Year**
Excludes Merger Objections
January 2014–December 2018

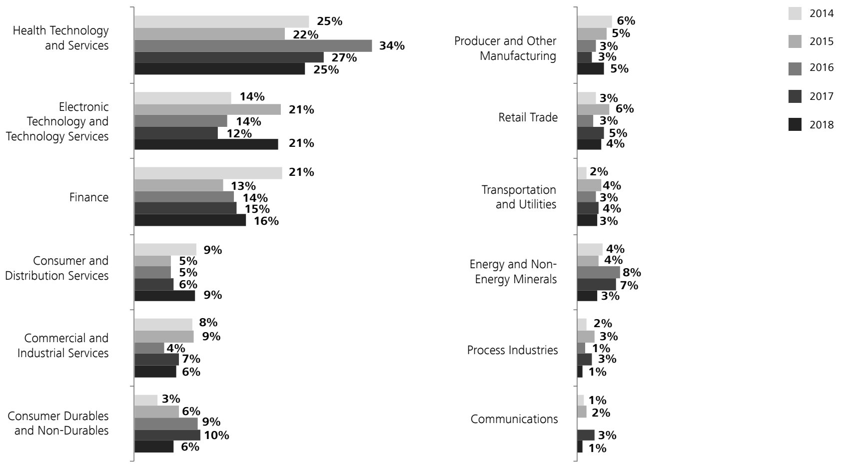


Filings by Sector

In 2018, filing counts were highest in the three historically dominant sectors, which include firms involved in health care, technology, and financial services (see Figure 11). The share of filings in these sectors increased to 62% in 2018 from about 54% in 2017, primarily due to a surge in filings against firms in the technology sector. Despite the drop in the percentage of health care companies targeted, the percentage of targeted firms in the Drugs industry (SIC 283) was nearly unchanged from 2017.

Firms in technological industries were especially at risk of securities class actions alleging accounting issues, misleading earnings guidance, or firm performance issues.[15] The industry with the highest percentage of constituent companies targeted with such allegations was the Computer and Office Equipment industry (SIC 357), with more than 9% of listed companies subject to litigation. This was followed by the Electronic Components and Accessories industry (SIC 367), with 6% of firms targeted. In the Drugs industry (SIC 283), 5% of firms were targeted with a filing with such claims (mostly related to misleading announcements regarding future performance).

Figure 11. **Percentage of Filings by Sector and Year**
Excludes Merger Objections
January 2014–December 2018



Note: This analysis is based on the FactSet Research Systems, Inc. economic sector classification. Some of the FactSet economic sectors are combined for presentation.

Allegations

In contrast with growth observed in recent years, filings with regulatory claims (i.e., those alleging a failure to disclose a regulatory issue) slowed to 41 in 2018 from 57 in 2017, a drop from 26% of Standard cases to 19% (see Figure 12). While fewer regulatory cases were filed, the median case size grew fourfold to over $4 billion (as measured by NERA-defined Investor Losses). The slowdown in regulatory filings was partially offset by more allegations of accounting issues and missed earnings guidance, which grew 8% and 13%, respectively.

While the size of filed cases (as measured by NERA-defined Investor Losses) grew in each allegation category, those alleging accounting issues and missed earnings guidance were especially large and more frequently targeted technology firms. The median size of accounting claims exceeded $600 million in 2018 (a level not seen since 2008), with filings over the second half of the year being especially large. Firms in the technology sector had the most accounting claims, making up 29% of the total (up from 21% in 2017). Moreover, more than one-in-three filings against firms in the technology sector alleged accounting issues.

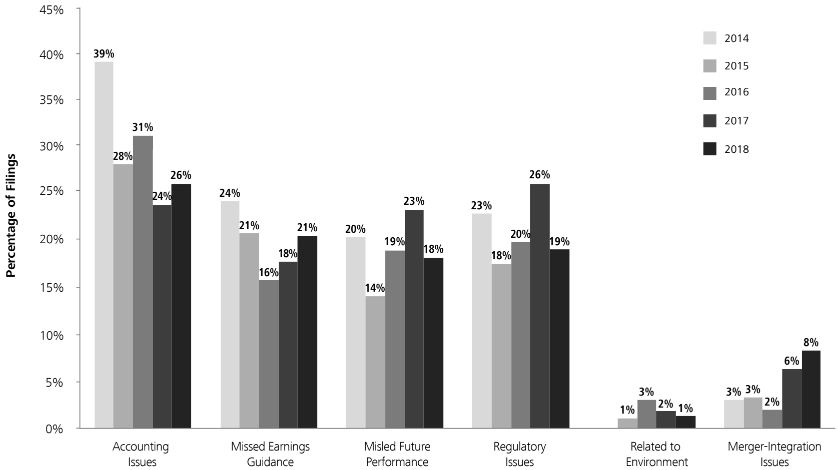
Filings claiming missed earnings guidance grew for the second straight year. Although the percentage of filings alleging missed guidance roughly matched that of 2015, the median case size (as measured by Investor Losses) was three times larger in 2018 than in 2015. Filings against firms in the technology sector with missed earnings guidance claims grew 70% since 2017 and constituted the largest share of such claims (at 27%).

In 2018, 8% of filings included merger integration allegations (i.e., claims of misrepresentations by a firm involved in a merger or acquisition). The substantial increase in litigation in 2017 corresponded with a 14% increase in announced M&A deals with US targets.[16] However, in 2018, despite a 12% slowdown in announced deal activity over the first three quarters, the number of federal merger integration filings rose.[17] The largest merger integration filing related to the failed Tribune Media/Sinclair merger, making up 20% of total Investor Losses.

As in prior years, most allegations related to misleading firm performance in 2018 were against firms in the health care sector. Within health care, firms in the Drugs industry (SIC 283) were subject to two-in-three filings.

Most complaints include a wide variety of allegations, not all of which are depicted here. Due to multiple types of allegations in complaints, the same case may be included in multiple categories.

Figure 12. **Allegations**
Shareholder Class Actions with Alleged Violations of Rule 10b-5, Section 11, and/or Section 12
January 2014–December 2018

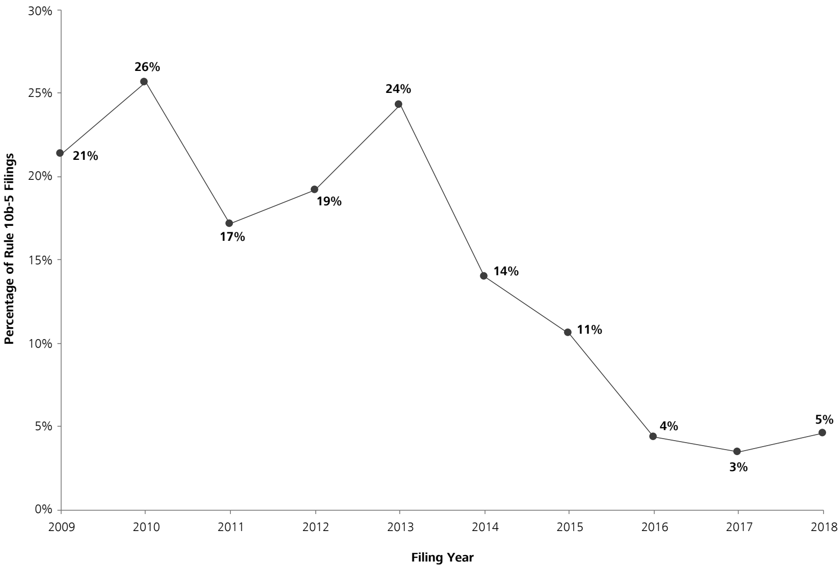


Alleged Insider Sales

Historically, Rule 10b-5 class action complaints have frequently alleged insider sales by directors and officers, usually as part of a scienter argument. Since 2013, in the wake of a multiyear crackdown on insider trading by prosecutors, the percentage of 10b-5 class actions that alleged insider sales has decreased nearly every year (see Figure 13).[18] This trend also corresponds with increased corporate adoption of 10b5-1 trading plans, allowing insiders to plan share sales while purportedly not in possession of material non-public information.[19]

Cases alleging insider sales were more common in the aftermath of the financial crisis, when a quarter of filings included insider trading claims. In 2005, half of class actions filed included such claims.

Figure 13. **Percentage of Rule 10b-5 Filings Alleging Insider Sales by Filing Year**
January 2009–December 2018



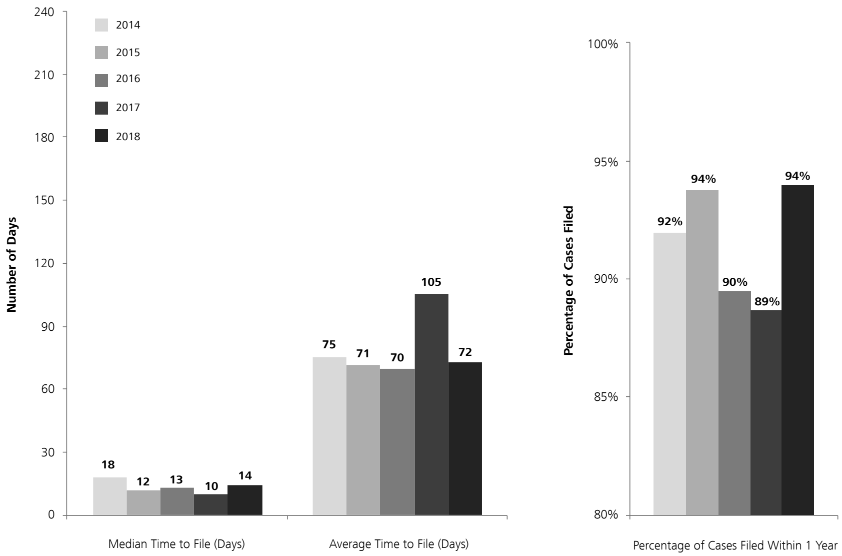
Time to File

The term "time to file" denotes the time that has elapsed between the end of the alleged class period and the filing date of the first complaint. Figure 14 illustrates how the median time and average time to file Rule 10b-5 cases (in days) have changed over the past five years.

The median time to file fell by about half over the last decade, to 14 days in 2018, indicating that it took 14 days or less to file a complaint in 50% of cases. Since the beginning of the decade, there has been a lower frequency of cases with long periods between the point when an alleged fraud was revealed and the filing of a related claim. The average time to file has followed a similar trajectory, but in 2017 was affected by 10 cases with very long filing delays. In 2017, one case against Rio Tinto, regarding the valuation of mining assets in Mozambique, took more than 4.5 years to file and boosted the average time to file by nearly 9%.[20]

Despite the small minority of cases with very long times to file, the data generally point toward a lower incidence of cases with long periods between revelations of alleged fraud and the date a related claim is filed.

Figure 14. **Time to File Rule 10b-5 Cases from End of Alleged Class Period to File Date**
January 2014–December 2018



Note: This analysis excludes cases where the alleged class period could not be unambiguously determined.

Analysis of Motions

NERA's statistical analysis has found robust relationships between settlement amounts and the stage of the litigation at which settlements occur. We track filings and decisions on three types of motions: motion to dismiss, motion for class certification, and motion for summary judgment. For this analysis, we include securities class actions in which purchasers of common stock are part of the class and in which a violation of Rule 10b-5, Section 11, and/or Section 12 is alleged (i.e., Standard cases).

As shown in the figures below, we record the status of any motion as of the resolution of the case. For example, a motion to dismiss that had been granted but was later denied on appeal is recorded as denied.

Motions for summary judgment were filed by defendants in 7.1%, and by plaintiffs in only 1.9%, of the securities class actions filed and resolved over the 2000–2018 period, among those we tracked.[21]

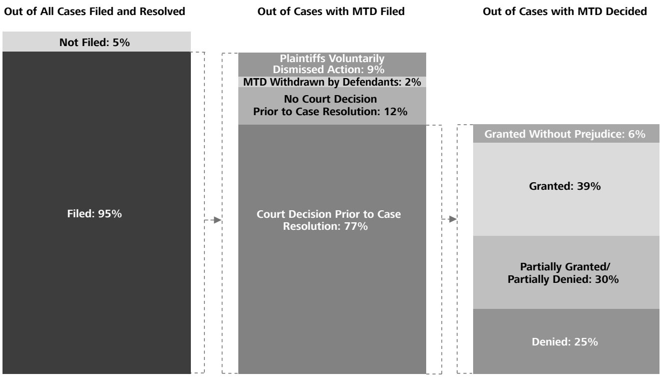
Outcomes of motions to dismiss and motions for class certification are discussed below.

Motion to Dismiss

A motion to dismiss was filed in 95% of the securities class actions tracked. However, the court reached a decision on only 77% of the motions filed. In the remaining 23% of cases, either the case resolved before a decision was reached, plaintiffs voluntarily dismissed the action, or the motion to dismiss was withdrawn by defendants (see Figure 15).

Out of the motions to dismiss for which a court decision was reached, the following three outcomes classify all of the decisions: granted with or without prejudice (45%), granted in part and denied in part (30%), and denied (25%).

Figure 15. **Filing and Resolutions of Motions to Dismiss**
Cases Filed and Resolved January 2000–December 2018



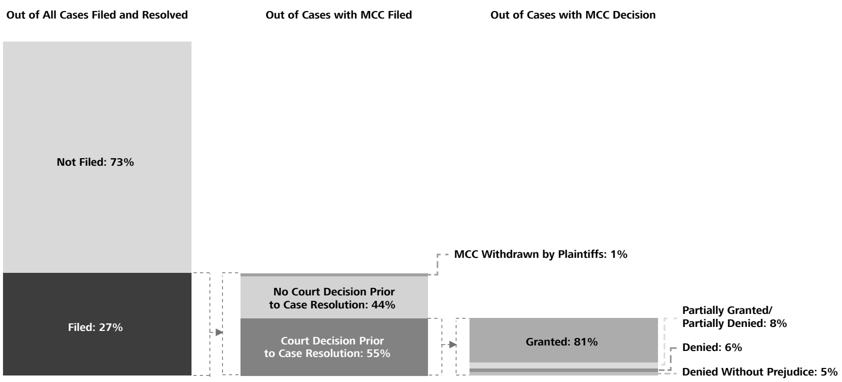
Note: Includes cases in which holders of common stock are part of the class and a Rule 10b-5, Section 11, and/or Section 12 is alleged. Excludes IPO laddering cases.

Motion for Class Certification

Most cases were settled or dismissed before a motion for class certification was filed: 73% of cases fell into this category. Of the remaining 27% (in which a motion for class certification was filed), the court reached a decision in only 55% of cases. Overall, only 15% of the securities class actions filed (or 55% of the 27%) reached a decision on the motion for class certification (see Figure 16).

According to our data, 89% of the motions for class certification that were decided were granted partially or in full.

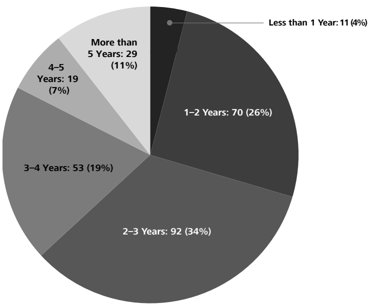
Figure 16. **Filing and Resolutions of Motions for Class Certification**
Cases Filed and Resolved January 2000–December 2018



Note: Includes cases in which holders of common stock are part of the class and a Rule 10b-5, Section 11, and/or Section 12 is alleged.
Excludes IPO laddering cases.

Approximately 64% of the decisions handed down on motions for class certification were reached within three years of the complaint's original filing date (see Figure 17). The median time was about 2.5 years.

igure 17. **Time from First Complaint Filing to Class Certification Decision**
Cases Filed and Resolved January 2000–December 2018



Note: Includes cases in which holders of common stock are part of the class and a 10b-5 or Rule 10b-5, Section 11, and/or Section 12 is alleged. xcludes IPO laddering cases.

Trends in Case Resolutions

Number of Cases Settled or Dismissed

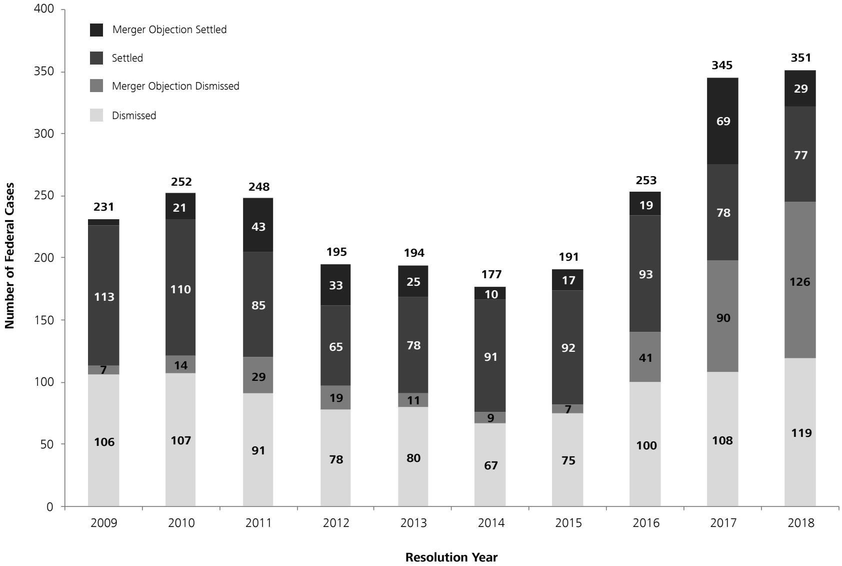
In total, 351 securities class actions were resolved in 2018, the second consecutive year in which a record number of cases concluded (see Figure 18). Resolution numbers were once again dominated by a record number of dismissals, which outnumbered settlements two-to-one for the first time.

Of the 351 resolutions, slightly less than half were resolutions of merger-objection cases (most of which were voluntarily dismissed). The uptick in resolutions over the last few years is largely due to the surge of federal merger-objection cases in the wake of the *Trulia* decision in early 2016.[22] Prior to *Trulia*, only about 13% of resolutions concerned merger-objection litigation. Merger objections had an outsized impact on resolution statistics: despite making up only about 33% of all active cases, they constituted 44% of resolutions.[23]

In 2018, 196 resolutions were of "Standard" securities class actions—those alleging violations of Rule 10b-5, Section 11, and/or Section 12. Standard settlement and dismissal counts closely matched those of 2017, and again more cases were dismissed than settled.

For the second consecutive year, an inordinate number of Standard cases were dismissed within a year of filing, most of which were voluntary dismissals. As shown in Figure 31, the decision to voluntarily dismiss litigation may change with the size of estimated damages to the class. For instance, plaintiffs may be more likely to voluntarily dismiss litigation if the price of the security at issue subsequently increases during the PSLRA bounce-back period.

Figure 18. **Number of Resolved Cases: Dismissed or Settled**
January 2009–December 2018



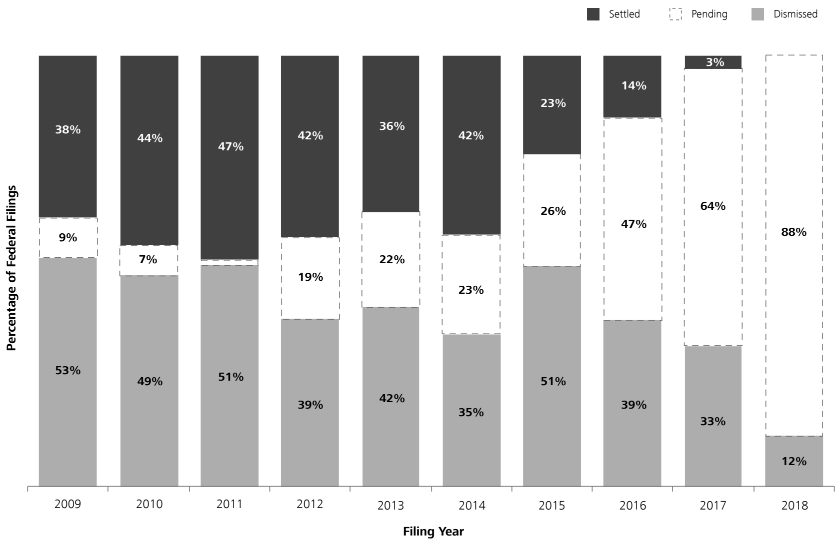
Case Status by Year

Figure 19 shows the current resolution status of cases by filing year. Each percentage represents the current resolution status of cases filed in each year as a proportion of all cases filed in that year. Merger-objection cases are excluded, as are verdicts.

Historically, more cases settled than were dismissed. However, the rate of case dismissal has steadily increased. While only about a third of cases filed between 2000 and 2002 were dismissed, in 2015, the most recent year with substantial resolution data, at least half of filed cases were dismissed.[24]

While dismissal rates have been climbing since 2000, the ultimate dismissal rate for cases filed in more recent years is less certain. On one hand, the dismissal rate may increase further, as there are more pending cases awaiting resolution. On the other hand, it may decrease because recent dismissals have more potential than older ones to be appealed or re-filed, and cases that were recently dismissed without prejudice may ultimately result in settlements.

Figure 19. **Status of Cases as Percentage of Federal Filings by Filing Year**
Excludes Merger Objections and Verdicts
January 2009–December 2018



Note: Dismissals may include dismissals without prejudice and dismissals under appeal.

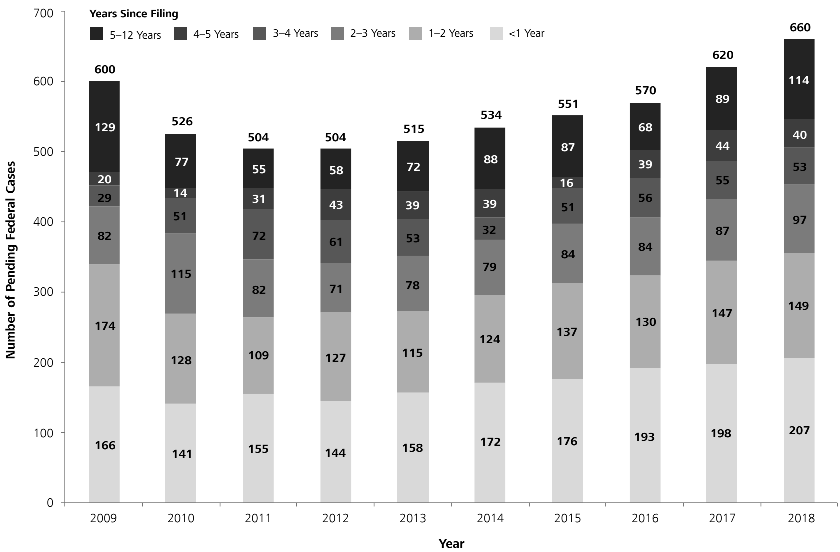
Number of Cases Pending

The number of Standard securities class actions pending in the federal system has steadily increased from a post-PSLRA low of 504 in 2012 (see Figure 20).[25] Since then, pending case counts have increased between 2% and 9% annually. In 2018, the number of pending Standard cases on federal dockets increased to 660, up 6% from 2017 and 31% from 2012.

Generally, since cases are either pending or resolved, a change in filing rate or a lengthening of the time to case resolution potentially contributes to changes in the number of cases pending. If the number of new filings is constant, the change in the number of pending cases can be indicative of whether the time to case resolution is generally shortening or lengthening.

About 50% of the long-term growth in pending litigation can be explained by recent filing growth (filed over the past two years), the vast majority of which is simply due to more cases being filed that have yet to be resolved. Delayed resolution of older filings (i.e., cases filed before 2017) explains the other 50% or so of growth in pending litigation since 2011. More old cases on federal dockets has driven the median age of pending cases up 14% since 2015 to about 1.9 years, the highest since 2010.[26]

Figure 20. **Number of Pending Federal Cases**
Excludes Merger Objections
January 2009–December 2018



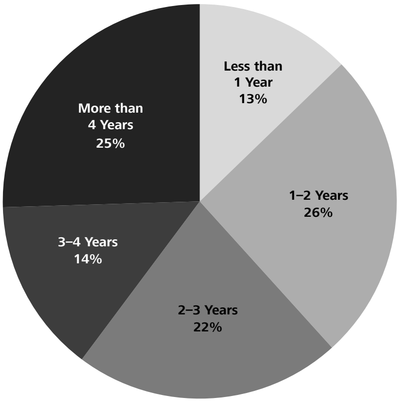
Note: The figure excludes, in each year, cases that had been filed more than 12 years earlier. Years since filing are end-of-year calculations. The figure also excludes IPO laddering cases. The 12-year limit ensure that all pending cases were filed post-PSLRA.

Time to Resolution

The term "time to resolution" denotes the time between the filing of the first complaint and resolution (whether through settlement or dismissal). Figure 21 illustrates the time to resolution for all securities class actions filed between 2001 and 2014, and shows that about 39% of cases are resolved within two years of initial filing and about 61% are resolved within three years.[27]

The median time to resolution for cases filed in 2016 (the last year with sufficient resolution data) was 2.3 years, similar to the range over the preceding five years. Over the past decade, the median time to resolution declined by more than 10%, primarily due to an increase in the dismissal rate (dismissals are generally resolved faster than settlements).

Figure 21. **Time from First Complaint Filing to Resolution**
Cases Filed January 2001–December 2014



Trends in Settlements

We present several settlement metrics to highlight attributes of cases that settled in 2018 and to compare them with cases settled in past years. We discuss two ways of measuring average settlement amounts and calculate the median settlement amount. Each calculation excludes merger-objection cases and cases that settle with no cash payment to the class, as settlements of such cases may obscure trends in what have historically been more typical cases.

In 2018, the average settlement rebounded to $69 million from a near-record low in 2017, largely due to the $3 billion settlement involving Petróleo Brasileiro S.A.—Petrobras, the fifth-highest settlement ever. Even excluding Petrobras (the only settlement of the year exceeding $1 billion), the average settlement exceeded $30 million, which is about average in the post-PSLRA era (after adjusting for inflation). The median settlement in 2018 was more than twice that of 2017, primarily due to higher settlements of many moderately sized cases and, generally, fewer very small settlements.

The upswing in 2018 settlement metrics may be a prelude to higher settlements in the future. Aggregate NERA-defined Investor Losses of pending cases, a factor that has historically been significantly correlated with settlement amounts, increased for the third consecutive year and currently exceeds $1.4 trillion (or $1.1 trillion excluding 2018 litigation against GE). Excluding GE, average Investor Losses of pending Standard cases have also increased for the third consecutive year to $2.4 billion, but have receded from a 10-year high of $3.8 billion in 2011.

To illustrate how many cases settled over various ranges in 2017 compared with prior years, we provide a distribution of settlements over the past five years. We also tabulated the 10 largest settlements of the year.

Average and Median Settlement Amounts

The average settlement exceeded $69 million in 2018, somewhat less than three times the $25 million average settlement in 2017 (see Figure 22). Infrequent large settlements, such as the 2018 Petrobras settlement, are generally responsible for the wide variability in average settlements over the past decade. Similar spikes to the one observed this year were also seen in 2010, 2013, and 2016, each primarily stemming from mega-settlements.

Figure 22. **Average Settlement Value**
Excludes Merger Objections and Settlements for $0 to the Class
January 2009–December 2018

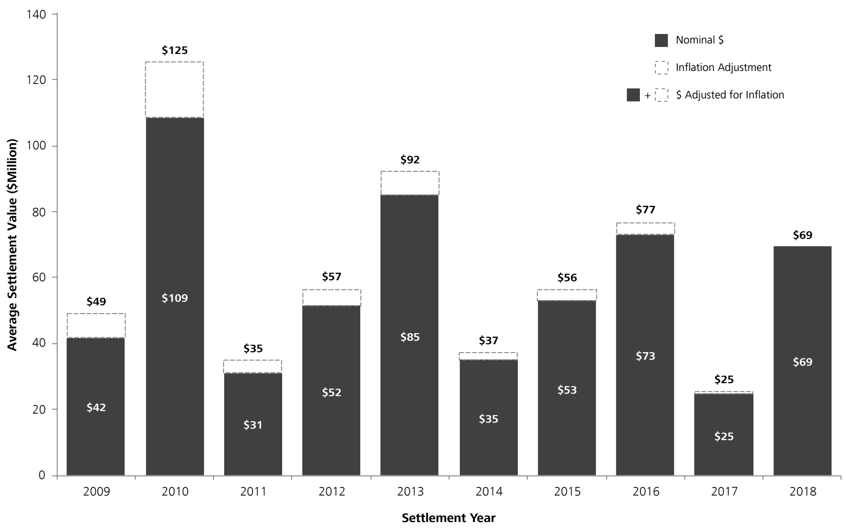
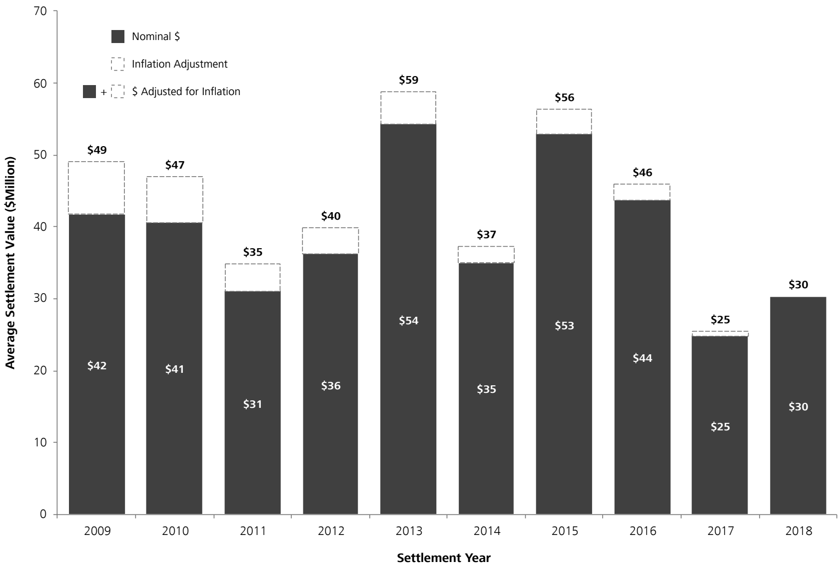


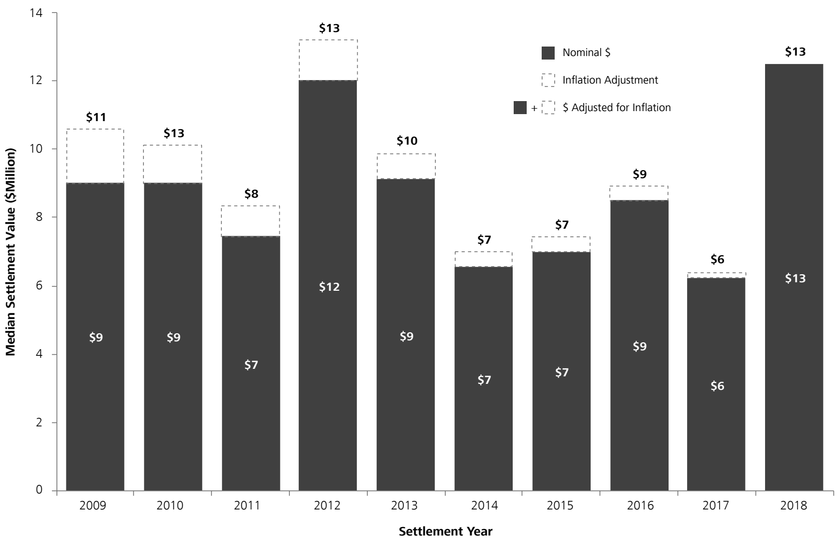
Figure 23 illustrates that, excluding settlements over $1 billion, the average settlement rebounded from the record low seen in 2017 to $30 million. Despite this rebound, and setting aside the $3 billion Petrobras settlement, the 2018 average settlement remained below average compared to the past decade. The metric would have roughly matched the near-record low seen in 2017 but for the $480 million Wells Fargo settlement that was finalized in mid-December 2018.

Figure 23. **Average Settlement Value**
Excludes Settlements over $1 Billion, Merger Objections, and Settlements for $0 to the Class
January 2009–December 2018



The 2018 median settlement was a near-record $13 million. This was driven primarily by relatively high settlements of moderately sized cases (as measured by NERA-defined Investor Losses). Cases of moderate size not only made up the bulk of settlements in 2018 but also had a median ratio of settlement to Investor Losses more than 50% higher than in past years. Moreover, unlike 2017, there were generally few very small settlements.

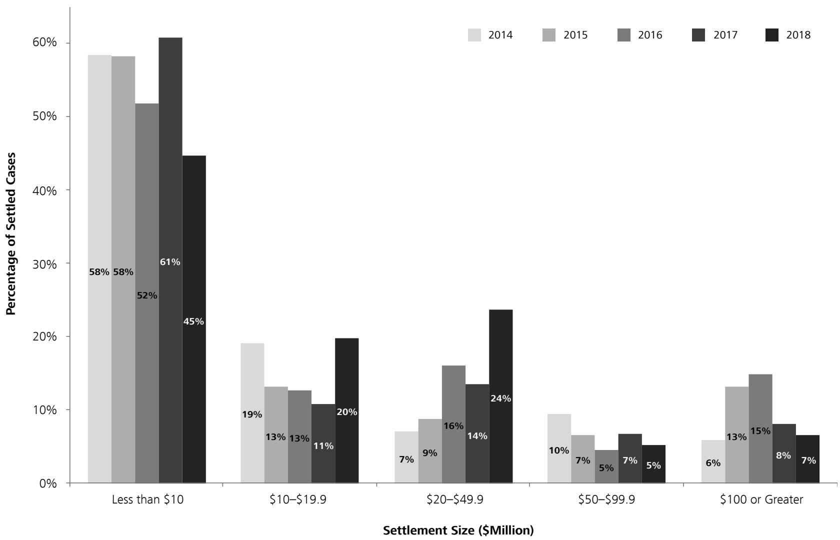
Figure 24. **Median Settlement Value**
Excludes Settlements over $1 Billion, Merger Objections, and Settlements for $0 to the Class
January 2009–December 2018



Distribution of Settlement Amounts

The relatively high settlements of moderately sized cases in 2018 are also captured in the distribution of settlement values (see Figure 25). In 2018, fewer than 45% of settlements were for less than $10 million (the lowest rate since 2010), which stands in stark contrast with 2017, when more than 60% of settlements were in the smallest strata (the highest rate since 2011).

Figure 25. **Distribution of Settlement Values**
Excludes Merger Objections and Settlements for $0 to the Class
January 2014–December 2018



The 10 Largest Settlements of Securities Class Actions of 2018

The 10 largest securities class action settlements of 2018 are shown in Table 1. The two largest settlements, against Petrobras and Wells Fargo & Company, are among many large regulatory cases filed in recent years. Three of the 10 largest settlements involved defendants in the Finance sector. Overall, these 10 cases accounted for about $4.4 billion in settlement value, a near-record 84% of the $5.3 billion in aggregate settlements.

Despite the size of the Petrobras settlement, it is not even half the size of the second-largest settlement since passage of the PSLRA, WorldCom, Inc., at $6.2 billion (see Table 2).

Table 1. **Top 10 2018 Securities Class Action Settlements**

Ranking	Case Name	Total Settlement Value ($Million)	Plaintiffs' Attorneys' Fees and Expenses Value ($Million)
1	Petróleo Brasileiro S.A.—Petrobras (2014)	$3,000.0	$205.0
2	Wells Fargo & Company (2016)	$480.0	$96.4
3	Allergan, Inc.	$290.0	$71.0
4	Wilmington Trust Corporation	$210.0	$66.3
5	LendingClub Corporation	$125.0	$16.8
6	Yahoo! Inc. (2017)	$80.0	$14.8
7	SunEdison, Inc.	$73.9	$19.0
8	Marvell Technology Group Ltd. (2015)	$72.5	$14.1
9	3D Systems Corporation	$50.0	$15.5
10	Medtronic, Inc. (2013)	$43.0	$8.6
	Total	**$4,424.4**	**$527.4**

Table 2. **Top 10 Securities Class Action Settlements**
As of 31 December 2018

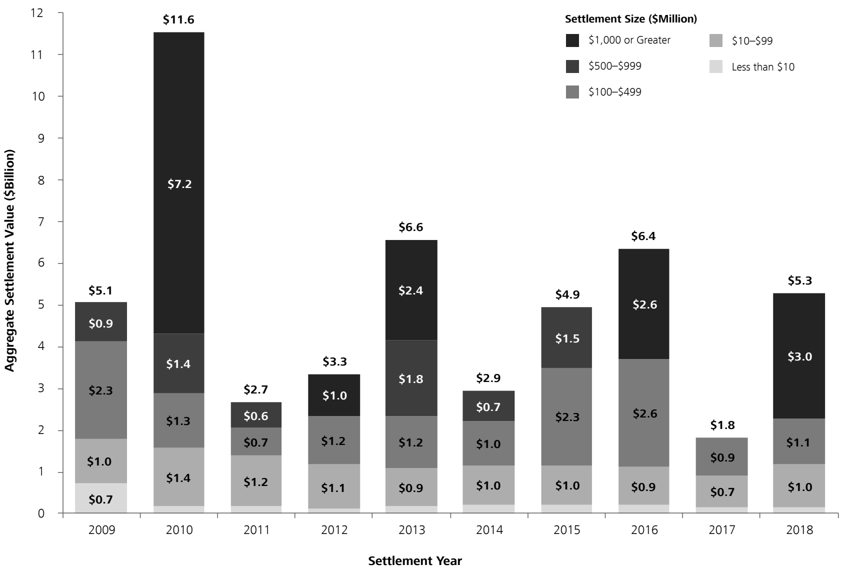
				Codefendant Settlements		
Ranking	Defendant	Settlement Year(s)	Total Settlement Value ($Million)	Financial Institutions Value ($Million)	Accounting Firms Value ($Million)	Plaintiffs' Attorneys' Fees and Expenses Value ($Million)
1	ENRON Corp.	2003–2010	$7,242	$6,903	$73	$798
2	WorldCom, Inc.	2004–2005	$6,196	$6,004	$103	$530
3	Cendant Corp.	2000	$3,692	$342	$467	$324
4	Tyco International, Ltd.	2007	$3,200	No codefendant	$225	$493
5	Petróleo Brasileiro S.A.—Petrobras	2018	$3,000	$0	$50	$205
6	AOL Time Warner Inc.	2006	$2,650	No codefendant	$100	$151
7	Bank of America Corp.	2013	$2,425	No codefendant	No codefendant	$177
8	Household International, Inc.	2006–2016	$1,577	Dimissed	Dismissed	$427
9	Nortel Networks (I)	2006	$1,143	No codefendant	$0	$94
10	Royal Ahold, NV	2006	$1,100	$0	$0	$170
	Total		**$32,224**	**$13,249**	**$1,017**	**$3,368**

Aggregate Settlements

We use the term "aggregate settlements" to denote the total amount of money to be paid to settle litigation by (non-dismissed) defendants based on the court-approved settlements during a year.

Aggregate settlements rebounded to nearly $5.3 billion in 2018, more than double the 2017 total (see Figure 26). More than 80% of the growth stems from the $3.0 billion Petrobras settlement. Excluding Petrobras and Wells Fargo, aggregate settlements are near the 2017 record low, reflecting a persistent slowdown in overall settlement activity.

Figure 26. **Aggregate Settlement Value by Settlement Size**
January 2009–December 2018



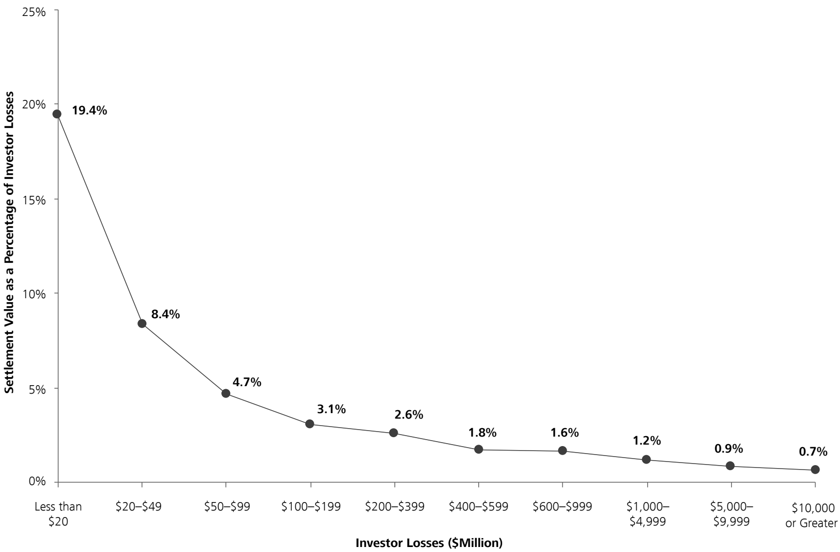
NERA-Defined Investor Losses vs. Settlements

As noted above, our proxy for case size, NERA-defined Investor Losses, is a measure of the aggregate amount investors lost from buying the defendant's stock rather than investing in the broader market during the alleged class period.

In general, settlement size grows as NERA-defined Investor Losses grow, but the relationship is not linear. Based on our analysis of data from 1996 to 2018, settlement size grows less than proportionately with Investor Losses. In particular, small cases typically settle for a higher fraction of Investor Losses (i.e., more cents on the dollar) than larger cases. For example, the ratio of settlement to Investor Loss for the median case was 19.4% for cases with Investor Losses of less than $20 million, while it was 0.7% for cases with Investor Losses over $10 billion (see Figure 27).

Our findings about the ratio of settlement amount to NERA-defined Investor Losses should not be interpreted as the share of damages recovered in settlement, but rather as the recovery compared to a rough measure of the "size" of the case. Notably, the percentages given here apply *only* to NERA-defined Investor Losses. Using a different definition of investor losses would result in a different ratio. Also, the use of the ratio alone to forecast the likely settlement amount would be inferior to a proper all-encompassing analysis of the various characteristics shown to impact settlement amounts, as discussed in the section *Explaining Settlement Values*.

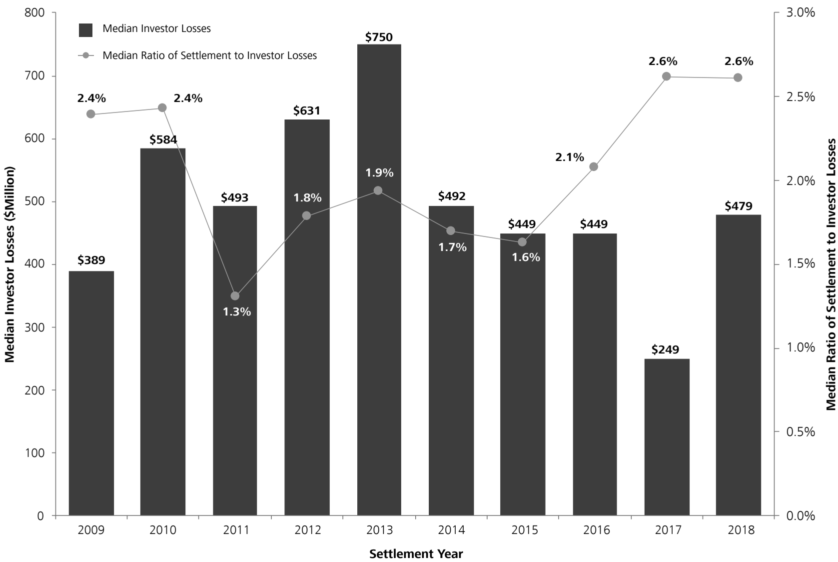
Figure 27. **Median of Settlement Value as a Percentage of NERA-Defined Investor Losses by Level of Investor Losses**
Excludes Settlements for $0 to the Class
January 1996–December 2018



Median NERA-Defined Investor Losses over Time
Prior to 2014, median NERA-defined Investor Losses for settled cases had been on an upward trajectory since the passage of the PSLRA. As described above, the median ratio of settlement size to Investor Losses generally decreases as Investor Losses increase. Over time, the increase in median Investor Losses coincided with a decreasing trend in the median ratio of settlement to Investor Losses. Of course, there are also year-to-year fluctuations.

As shown in Figure 28, the median ratio of settlements to NERA-defined Investor Losses was 2.6% in 2018. This was the third consecutive year of at least a short-term reversal of a long-term downtrend of the ratio between passage of the PSLRA and 2015.

Figure 28. **Median NERA-Defined Investor Losses and Median Ratio of Settlement to Investor Losses by Settlement Year**
January 2009–December 2018



Explaining Settlement Amounts

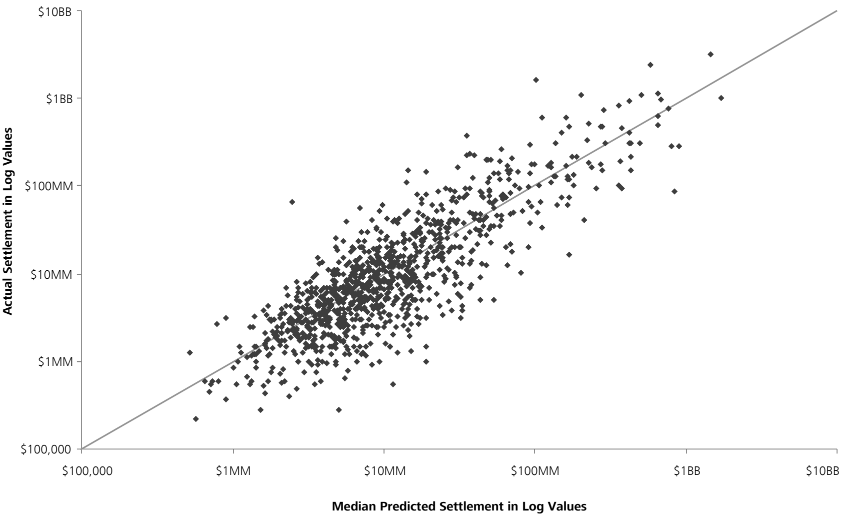
The historical relationship between case attributes and other case- and industry-specific factors can be used to measure the factors correlated with settlement amounts. NERA has examined settlements in more than 1,000 securities class actions and identified key drivers of settlement amounts, many of which have been summarized in this report.

Generally, we find that the following factors have historically been significantly correlated with settlements:

- NERA-defined Investor Losses (a proxy for the size of the case);
- The market capitalization of the issuer;
- Types of securities alleged to have been affected by the fraud;
- Variables that serve as a proxy for the "merit" of plaintiffs' allegations (such as whether the company has already been sanctioned by a governmental or regulatory agency or paid a fine in connection with the allegations);
- Admitted accounting irregularities or restated financial statements;
- The existence of a parallel derivative litigation; and
- An institution or public pension fund as lead plaintiff.

Together, these characteristics and others explain most of the variation in settlement amounts, as illustrated in Figure 29.[28]

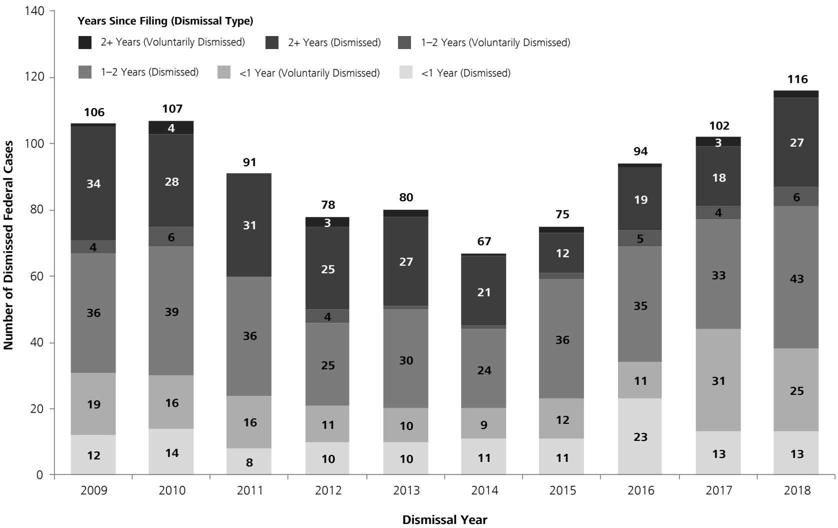
Figure 29. **Predicted vs. Actual Settlements**



Trends in Dismissals

The elevated rate of case dismissal persisted in 2018 (excluding merger objections), with more than 100 dismissals for the second consecutive year (see Figure 30). This partially stems from more cases being filed over the past couple of years, as 75% of dismissals are of cases less than two years old. Additionally, there were 25 voluntary dismissals within a year of filing, an elevated rate for the second year in a row.

Figure 30. **Number of Dismissed Cases by Case Age**
Excludes Merger Objections
January 2009–December 2018



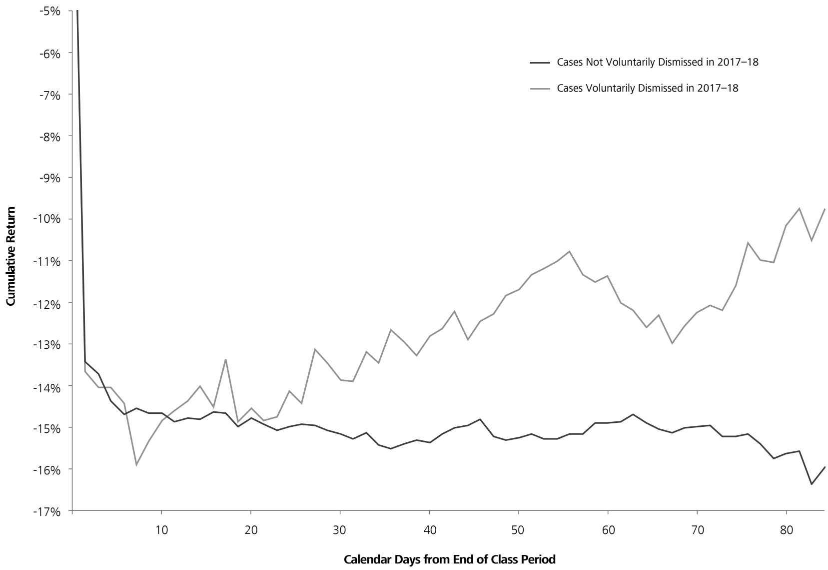
In 2018, about 12% of Standard cases were filed and resolved within the same calendar year, the second-highest rate in at least a decade (after 2017). By the end of the year, 8% of cases were voluntarily dismissed (down from 11% in 2017, but double the 2012–2016 average). Plaintiffs' voluntary dismissal of a case may be a result of perceived case weakness or changes in financial incentives. Recent research also documented forum selection by plaintiffs as a driver of voluntary dismissal without prejudice.[29]

The incentive for plaintiffs (and/or their counsel) to proceed with litigation may change with estimated damages to the class and expected recoveries since filing. For instance, the PSLRA 90-day bounce-back provision caps the award of damages to plaintiffs by the difference between the purchase price of a security and the mean trading price of the security during the 90-day period beginning on the date of the alleged corrective disclosure.

Since most securities class actions are filed well before the end of the bounce-back period (see Figure 14 for time-to-file metrics), plaintiffs may be more likely to voluntarily dismiss litigation if the price of the security at issue subsequently increases. As shown in Figure 31, in 2017 and 2018, the 90-day return of securities underlying cases voluntarily dismissed was about seven percentage points greater, on average, than securities underlying cases not voluntarily dismissed.[30]

The rate of voluntary dismissals was not particularly concentrated in terms of jurisdiction or the specific allegations we track.

Figure 31. **Average PSLRA Bounce-Back Period Returns of Voluntary Dismissals**
Shareholder Class Actions with Alleged Violations of Rule 10b-5, Section 11, or Section 12
January 2017–December 2018



Note: To control for the impact of outliers on the average of each group, for each day the most extreme 5% of cumulative returns are dropped. Observations on the three final trading days of the bounce-back period for each category are dropped due to incomplete return data.

Trends in Attorneys' Fees

Plaintiffs' Attorneys' Fees and Expenses

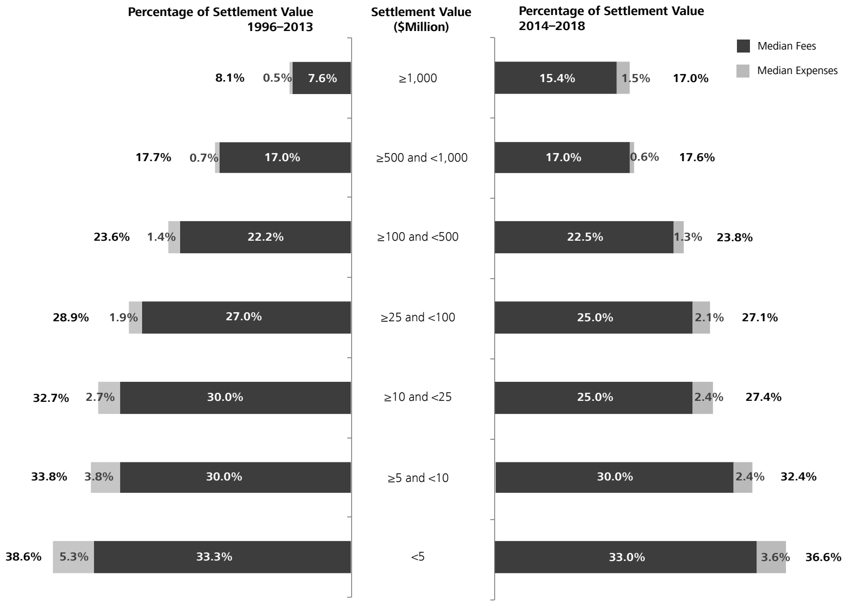
Usually, plaintiffs' attorneys' remuneration is determined as a fraction of any settlement amount in the form of fees, plus expenses. Figure 32 depicts plaintiffs' attorneys' fees and expenses as a proportion of settlement values over ranges of settlement amounts. The data shown in this figure excludes settlements for merger-objection cases and cases with no cash payment to the class.

A strong pattern is evident in Figure 32; typically, fees grow with settlement size, but less than proportionally (i.e., the fee percentage shrinks as the settlement size grows).

To illustrate that the fee percentage typically shrinks as settlement size grows, we grouped settlements by settlement value and reported the median fee percentage for each group. While fees are stable at around 30% of settlement values for settlements below $10 million, this percentage declines as settlement size increases.

We also observe that fee percentages have been decreasing over time, except for fees awarded on very large settlements. For settlements above $1 billion, fee rates have increased.

Figure 32. **Median of Plaintiffs' Attorneys' Fees and Expenses by Size of Settlement**
Excludes Merger Objections and Settlements for $0 to the Class



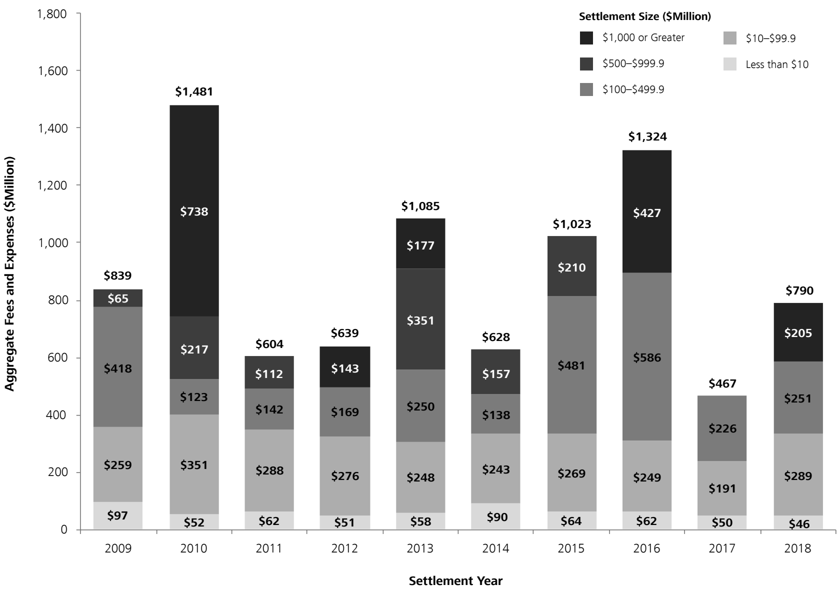
Aggregate Plaintiffs' Attorneys' Fees and Expenses

Aggregate plaintiffs' attorneys' fees and expenses are the sum of all fees and expenses received by plaintiffs' attorneys for all securities class actions that receive judicial approval in a given year.

In 2018, aggregate plaintiffs' attorneys' fees and expenses were $790 million, about 70% higher than in 2017 (see Figure 33). The increase in fees partially reflects the rebound in settlements, but fees grew substantially less than the near-tripling of aggregate settlements. This is partially due to the outsized impact of the $3 billion Petrobras settlement, one of several mega-settlements that historically generates lower fees as a percentage of settlement value.

Note that Figure 33 differs from the other figures in this section because the aggregate includes fees and expenses that plaintiffs' attorneys receive for settlements in which no cash payment was made to the class.

Figure 33. **Aggregate Plaintiffs' Attorneys' Fees and Expenses by Settlement Size**
January 2009–December 2018



Notes

1 This edition of NERA's report on recent trends in securities class action litigation expands on previous work by our colleagues Lucy Allen, Dr. Vinita Juneja, Dr. Denise Neumann Martin, Dr. Jordan Milev, Robert Patton, Dr. Stephanie Plancich, and others. The authors also thank Dr. Milev for helpful comments on this edition. These individuals receive credit for improving this paper; all errors and omissions are ours.

2 Data for this report are collected from multiple sources, including Institutional Shareholder Services Inc., complaints, case dockets, Dow Jones Factiva, Bloomberg Finance L.P., FactSet Research Systems, Inc., Nasdaq, Inc., Intercontinental Exchange, Inc., US Securities and Exchange Commission (SEC) filings, and public press reports.

3 *In re Trulia, Inc. Stockholder Litigation*, C.A. No. 10020-CB (Del. Ch. Jan. 22, 2016).

4 Craig Doidge, G. Andrew Karolyi, and René M. Stulz, "The U.S. Listing Gap," National Bureau of Economic Research Working Paper No. 21181, May 2015.

5 *In re Trulia, Inc. Stockholder Litigation*, C.A. No. 10020-CB (Del. Ch. Jan. 22, 2016).

6 For M&A statistics, see "Mergers & Acquisitions Review: First Nine Months 2018," Thomson Reuters, October 2018, available at http://dmi.thomsonreuters.com/Content/Files/3Q2018_MA_Legal_Advisor_Review.pdf.

7 *In re Trulia, Inc. Stockholder Litigation*, C.A. No. 10020-CB (Del. Ch. Jan. 22, 2016).

8 Matthew D. Cain and Steven D. Solomon, "Takeover Litigation in 2015," Berkeley Center for Law, Business and the Economy, 14 January 2016.

9 Warren S. de Wied, "Delaware Forum Selection Bylaws After Trulia," Harvard Law School Forum on Corporate Governance and Financial Regulation, 25 February 2016.

10 *In re: Walgreen Co. Stockholder Litigation*, No. 15-3799 (7th Cir. Aug. 10, 2016).

11 Federal securities class actions that allege violations of Rule 10b-5, Section 11, and/or Section 12 have historically dominated federal securities class action dockets and often been referred to as "Standard" cases.

12 *Cyan, Inc. v. Beaver County Employees Retirement Fund*, Supreme Court No. 15-1439.

13 See Restoration Robotics Inc. SEC Form 8-K, filed 17 October 2017, and Snap, Inc. SEC Form S-1, filed 2 February 2017.

14 Regulatory cases with parallel accounting, performance, or missed earnings claims are excluded.

15 Industries with fewer than 25 firms listed on US exchanges are dropped.

16 For M&A statistics, see "Mergers & Acquisitions Review, Full Year 2017," Thomson Reuters, December 2017.

17 For M&A statistics, see "Mergers & Acquisitions Review, First Nine Months 2018," Thomson Reuters, October 2018.

18 "SAC to pay $1.8 billion to settle insider trading charges," Chicago Tribune, 4 November 2013, available at https://www.chicagotribune.com/business/ct-xpm-2013-11-04-chi-sac-to-pay-18-billion-to-settle-insider-trading-charges-20131104-story.html.

19 Filings indicate that most firms in the SP 500 have adopted 10b5-1 plans as of 2014. See "Balancing Act: Trends in 10b5-1 Adoption and Oversight Article," Morgan Stanley, 2019.

20 This case was filed after the SEC filed a complaint, more than four years after the end of the proposed class period, which plaintiffs in the class action state first revealed the alleged fraud.

21 Outcomes of the motions for summary judgment are available from NERA but are not shown in this report.

22 *In re Trulia, Inc. Stockholder Litigation*, C.A. No. 10020-CB (Del. Ch. Jan. 22, 2016).

23 Active cases equals the sum of pending cases at the beginning of 2018 plus those filed during the year.

24 Nearly 90% of cases filed before 2012 have been resolved, providing evidence of longer-term trends about dismissal and settlement rates. Data since then is inconclusive given pending litigation.

25 We only consider pending litigation filed after the PSLRA.

26 These metrics exclude merger objections.

27 Each of the metrics in the *Time to Resolution* sub-section exclude IPO laddering cases and merger-objection cases because the former usually take much longer to resolve and the latter are usually much shorter to resolve.

28 The axes are in logarithmic scale, and the two largest settlements are excluded from this figure.

29 Commentary regarding a 2017 ruling in the Southern District of New York indicated that "[p]laintiffs in [*Cheung v. Bristol-Myers Squibb*] had originally filed their lawsuits in a federal district court, but after the federal district court issued a ruling that was unfavorable for the plaintiffs, the plaintiffs voluntarily dismissed their lawsuits without prejudice and then refiled them in Delaware state court." See Colin E. Wrabley and Joshua T. Newborn, "Getting Your Company's Case Removed to Federal Court When Sued in Your 'Home' State," *The Legal Intelligencer*, 19 December 2017. The case referred to is *Cheung v. Bristol-Myers Squibb*, Case No. 17cv6223(DLC), (S.D.N.Y. Oct. 12, 2017).

30 To control for the impact of outliers on the average of each group, for each day the most extreme 5% of daily cumulative returns are dropped. Observations on the three final days of the bounce-back period for each category are dropped due to incomplete return data.

About NERA

NERA Economic Consulting (**www.nera.com**) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For over half a century, NERA's economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. We bring academic rigor, objectivity, and real world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance, and litigation.

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NOTES

7

ISS, Securities Class Action Services, The Top 100 U.S. Class Action Settlements of All Time (December 31, 2018)

ISS
Securities Class Action Services

THE TOP 100

U.S. Class Action Settlements of All Time

AS OF
DECEMBER 31, 2018

ISSGOVERNANCE.COM/CLASS-ACTIONS

ISS Securities Class Action Services

EXECUTIVE SUMMARY

For calendar 2018, ISS Securities Class Action Services LLC ("SCAS") recorded 126 approved securities class action settlements, four (4) of which are included in SCAS' Top 100, which charts the largest U.S. class action settlements since passage of the Private Securities Litigation Reform Act of 1995. The four new entrants into the Top 100 are:

- Petroleo Brasileiro S.A. (Petrobras) – $3 billion;
- Wells Fargo & Company – $480 million;
- Allergan, Inc – $250 million; and
- Wilmington Trust Corp – $210 million.

Collectively, in calendar year 2018 $5.84 billion in settlement funds were approved for distribution. While the count of settlements dropped by 23 percent to 126 from 163 in 2017, total settlement dollars were 164 percent higher than the prior year. Of the 126 settlements, 94 occurred in Federal Court while 32 occurred in a state court. Not surprisingly, the most frequent Federal Court was the U.S. District Court for the Southern District of New York ("USDC - New York (Southern)") with 20 settlements totalling $3.35 billion, while the most frequent State Court was the Delaware Court of Chancery with 13 settlements totalling $231.3 million.

The allegations of the four newly added settlements in the Top 100 were as follows[1]:

- Three were related to violations of Employment of Manipulative and Deceptive Practices of the Securities and Exchange Act of 1934 ("Rule 10b-5");
- Two were related to violations of Civil Liabilities on Account of False Registration Statement of the Securities Act of 1933 ("Section 11");
- Two were alleged violations of Generally Accepted Accounting Principles ("GAAP") which stemmed from financial restatements;
- Two were related to insider trading; and
- One was related to M&A transactions.

Interestingly, Petrobras, the largest settlement of 2018, becomes the largest non-U.S. company to settle within the U.S. court system (eligible shareholders were holders of the company's ADRs). Lead plaintiffs for this case included the Employees' Retirement System of the State of Hawaii; Universities Superannuation Scheme, Ltd; and the North Carolina Department of State Treasurer. Pomerantz LLP, now with two cases within the Top 100, was sole lead counsel. In January 2018, parties in the Petrobras case entered an agreement to settle, which was later finalized in USDC – New York (Southern) in July 2018. At $3 billion, the Petrobras settlement now stands as the fifth highest within the Top 100. Lead counsel (or co-lead counsel) for the three other new entrants into the Top 100 (Wells Fargo, Allergan, and Wilmington Trust) was Bernstein Litowitz Berger & Grossmann.

Not included within the Top 100 Report are antitrust cases; however, in 2018, investors were able to participate in a handful of key settlements totaling $4 billion, including the Foreign Exchange Benchmark Rates, Relevant LIBOR-Based Financial Instruments, ISDAfix Transactions, Euro Interbank Offered Rate, State AG LIBOR/Euribor, and Euroyen-Based Derivatives.

[1] The totals are greater than four as multiple allegations within one case (and settlement) are common.

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METHODOLOGY

This report provides the complete list of the Top 100 U.S. Securities Class Action settlements, ranked per the total settlement amount, and provides information on the filing court, settlement year and settlement fund. The Top 100 Report does not include non-U.S. cases and SEC disgorgements (data on these latter cases are compiled within its own Top 50 category). Cases with the same settlement amount are given the same ranking.

For cases with multiple partial settlements, the amount indicated in the total settlement amount is computed by combining all partial settlements. The settlement year reflects the year the most recent settlement received final approval from the court. Cases in the Top 100 are limited to those that have been filed on or after January 1, 1996. Only court approved final settlements are included.

SETTLEMENT CATEGORIZATION

The Top 100 U.S. Class Action Settlements of All Time provides a wealth of information, including the settlement year, filing court, settlement fund, and identifies the key players for each settlement. The report is broken down into following categories:

Institutional Lead Plaintiff Participation

This section displays the most frequent institutional lead plaintiffs in the Top 100 settlements. It also identifies the specific cases they served as lead plaintiff.

Lead Counsel Participation

This section lists the law firms that served as lead or co-lead counsel for each litigation in the Top 100 Settlements and identifies the most frequent lead or co-lead counsel in the Top 100 Settlements. Counsels with the same participation are given the same ranking. In addition, the list includes participation in cases where they were litigated under a previous name.

Claims Administration Participation

This section lists the claims administrators who handled the Top 100 Settlements and identifies the most frequent claims administrators. It includes settlements administered from old entities.

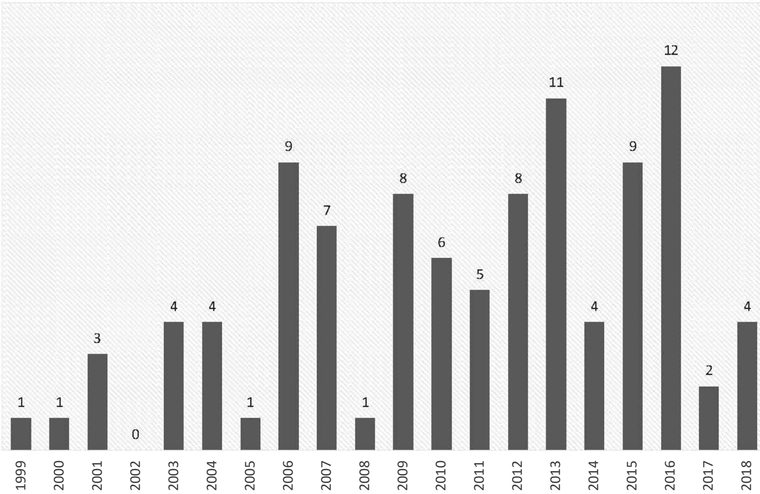
Restatements

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

Top 50 SEC Disgorgements

This section provides a list of the largest SEC settlements, ranked according to the Total Settlement Amount. The Total Settlement Amount reflects the sum of disgorgement and civil penalties in settlements reached with the Securities and Exchange Commission. The Top 50 SEC Disgorgements includes only those where the distribution plan has received final approval from the SEC. Cases with the same settlement amount are given the same ranking.

NUMBER OF SETTLEMENTS ADDED TO THE TOP 100



TOP 100 SETTLEMENTS

RANK	COMPANY NAME	COURT	SETTLEMENT YEAR	TOTAL SETTLEMENT AMOUNT
1	Enron Corp.	S.D. Tex.	2010	$7,242,000,000
2	WorldCom, Inc.	S.D.N.Y.	2012	$6,194,100,714
3	Cendant Corp.	D. N.J.	2000	$3,319,350,000
4	Tyco International, Ltd.	D. N.H.	2007	$3,200,000,000
5	Petroleo Brasileiro S.A. - Petrobras	S.D.N.Y.	2018	$3,000,000,000
6	AOL Time Warner, Inc.	S.D.N.Y.	2006	$2,500,000,000
7	Bank of America Corporation	S.D.N.Y.	2013	$2,425,000,000
8	Household International, Inc.	N.D. Ill.	2016	$1,575,000,000
9	Nortel Networks Corp. I	S.D.N.Y.	2006	$1,142,775,308
10	Royal Ahold, N.V.	D. Md.	2006	$1,100,000,000

ISS Securities Class Action Services

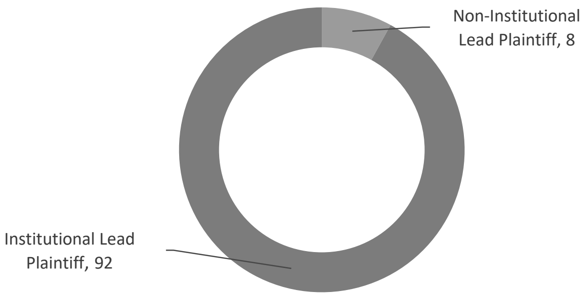
RANK	COMPANY NAME	COURT	SETTLEMENT YEAR	TOTAL SETTLEMENT AMOUNT
11	Nortel Networks Corp. II	S.D.N.Y.	2006	$1,074,265,298
12	Merck & Co., Inc.	D. N.J.	2016	$1,062,000,000
13	McKesson HBOC Inc.	N.D. Cal.	2013	$1,052,000,000
14	American International Group, Inc.	S.D.N.Y.	2013	$1,009,500,000
15	American International Group, Inc.	S.D.N.Y.	2015	$970,500,000
16	UnitedHealth Group, Inc.	D. Minn.	2009	$925,500,000
17	HealthSouth Corp.	N.D. Ala.	2010	$804,500,000
18	Xerox Corp.	D. Conn.	2009	$750,000,000
19	Lehman Brothers Holdings, Inc.	S.D.N.Y.	2014	$735,218,000
20	Citigroup Bonds	S.D.N.Y.	2013	$730,000,000
21	Lucent Technologies, Inc.	D. N.J.	2003	$667,000,000
22	Wachovia Preferred Securities and Bond/Notes	S.D.N.Y.	2011	$627,000,000
23	Countrywide Financial Corp.	C.D. Cal.	2011	$624,000,000
24	Cardinal Health, Inc.	S.D. Ohio	2007	$600,000,000
25	Citigroup, Inc.	S.D.N.Y.	2013	$590,000,000
26	IPO Securities Litigation (Master Case)	S.D.N.Y.	2012	$585,999,996
27	Bear Stearns Mortgage Pass-Through Certificates	S.D.N.Y.	2015	$500,000,000
27	Countrywide Financial Corp.	C.D. Cal.	2013	$500,000,000
29	BankAmerica Corp.	E.D. Mo.	2004	$490,000,000
30	Pfizer, Inc.	S.D.N.Y.	2016	$486,000,000
31	Wells Fargo & Company	N.D. Cal.	2018	$480,000,000
32	Adelphia Communications Corp.	S.D.N.Y.	2013	$478,725,000
33	Merrill Lynch & Co., Inc.	S.D.N.Y.	2009	$475,000,000
34	Dynegy Inc.	S.D. Tex.	2005	$474,050,000
35	Schering-Plough Corp.	D. N.J.	2013	$473,000,000
36	Raytheon Company	D. Mass.	2004	$460,000,000
37	Waste Management Inc.	S.D. Tex.	2003	$457,000,000
38	Global Crossing, Ltd.	S.D.N.Y.	2007	$447,800,000

RANK	COMPANY NAME	COURT	SETTLEMENT YEAR	TOTAL SETTLEMENT AMOUNT
39	Qwest Communications International, Inc.	D.D.C.	2009	$445,000,000
40	Federal Home Loan Mortgage Corp. (Freddie Mac)	S.D.N.Y.	2006	$410,000,000
41	Marsh & McLennan Companies, Inc.	S.D.N.Y.	2009	$400,000,000
41	Pfizer, Inc.	S.D.N.Y.	2015	$400,000,000
43	J.P. Morgan Acceptance Corp. I	S.D.N.Y.	2015	$388,000,000
44	Cendant Corp. II	D. N.J.	2006	$374,000,000
45	Refco, Inc.	S.D.N.Y.	2011	$358,300,000
46	IndyMac Mortgage Pass-Through Certificates	S.D.N.Y.	2015	$346,000,000
47	RALI Mortgage (Asset-Backed Pass-Through Certificates)	S.D.N.Y.	2015	$335,000,000
47	Bank of America Corporation	S.D.N.Y.	2016	$335,000,000
49	Rite Aid Corp.	E.D.Pa.	2003	$319,580,000
50	Merrill Lynch Mortgage Investors, Inc.	S.D.N.Y.	2012	$315,000,000
51	Williams Companies, Inc.	N.D. Ok.	2007	$311,000,000
52	Caremark, Rx, Inc. f/k/a MedPartners, Inc.	Alabama Circuit	2016	$310,000,000
53	General Motors Corp.	E.D. Mich.	2009	$303,000,000
54	Oxford Health Plans Inc.	S.D.N.Y.	2003	$300,000,000
54	DaimlerChrysler AG	D. Del.	2004	$300,000,000
54	Bristol-Myers Squibb Co.	S.D.N.Y.	2004	$300,000,000
54	General Motors Company	E.D. Mich.	2016	$300,000,000
58	Bear Stearns Companies, Inc.	S.D.N.Y.	2012	$294,900,000
59	El Paso Corporation	S.D. Tex.	2007	$285,000,000
60	Tenet Healthcare Corp.	C.D. Cal.	2008	$281,500,000
61	J.P. Morgan Acceptance Corp. I	E.D.N.Y.	2014	$280,000,000
61	BNY Mellon, N.A.	E.D. OK.	2012	$280,000,000
63	HarborView Mortgage Loan Trust	S.D.N.Y.	2014	$275,000,000
63	Activision Blizzard, Inc.	Delaware Chancery	2015	$275,000,000

RANK	COMPANY NAME	COURT	SETTLEMENT YEAR	TOTAL SETTLEMENT AMOUNT
65	GS Mortgage Securities Corp.	S.D.N.Y.	2016	$272,000,000
66	Massey Energy Company	W.D. Va.	2014	$265,000,000
67	3Com Corp.	N.D. Cal.	2001	$259,000,000
68	Allergan, Inc.	C.D. Cal.	2018	$250,000,000
69	Bernard L. Madoff Investment Securities LLC	S.D.N.Y.	2016	$235,250,000
70	Charles Schwab & Co., Inc.	N.D. Cal.	2011	$235,000,000
71	MF Global Holdings Ltd.	S.D.N.Y.	2016	$234,257,828
72	Comverse Technology, Inc.	E.D.N.Y.	2010	$225,000,000
73	Waste Management Inc.	N.D. Ill.	1999	$220,000,000
74	Bernard L. Madoff Investment Securities LLC	S.D.N.Y.	2013	$219,857,694
75	Genworth Financial, Inc.	E.D. Va.	2016	$219,000,000
76	Washington Mutual, Inc.	W.D. Wash.	2016	$216,750,000
77	Sears, Roebuck & Co.	N.D. Ill.	2006	$215,000,000
77	Merck & Co., Inc.	D. N.J.	2013	$215,000,000
77	HCA Holdings, Inc.	M.D. Tenn.	2016	$215,000,000
80	Salix Pharmaceuticals, Ltd.	S.D.N.Y.	2017	$210,000,000
80	Wilmington Trust Corporation	D. Del.	2018	$210,000,000
82	The Mills Corp.	E.D. Va.	2009	$202,750,000
83	CMS Energy Corp.	E.D. Mich.	2007	$200,000,000
83	Kinder Morgan, Inc.	Kansas District	2010	$200,000,000
83	Motorola, Inc.	N.D. Ill.	2012	$200,000,000
83	WellCare Health Plans, Inc.	M.D. Fla.	2011	$200,000,000
87	Safety-Kleen Corp.	D. S.C.	2006	$197,622,944
88	MicroStrategy Inc.	E.D. Va.	2001	$192,500,000
89	Motorola, Inc.	N.D. Ill.	2007	$190,000,000
90	Bristol-Myers Squibb Co.	D. N.J.	2006	$185,000,000
91	The Bank of New York Mellon Corporation	S.D.N.Y.	2015	$180,000,000

RANK	COMPANY NAME	COURT	SETTLEMENT YEAR	TOTAL SETTLEMENT AMOUNT
92	BP p.l.c.	S.D. Tex.	2017	$175,000,000
93	Broadcom Corp.	C.D. Cal.	2012	$173,500,000
94	Maxim Integrated Products, Inc.	N.D. Cal.	2010	$173,000,000
95	Federal National Mortgage Association (Fannie Mae)	S.D.N.Y.	2015	$170,000,000
96	Juniper Networks, Inc.	N.D. Cal.	2010	$169,500,000
97	National City Corp.	N.D. Ohio	2012	$168,000,000
98	Digex, Inc.	Delaware Chancery	2001	$165,000,000
98	Schering-Plough Corp.	D. N.J.	2009	$165,000,000
100	Pharmacia Corp.	D. N.J.	2013	$164,000,000

SETTLEMENTS REPRESENTED BY INSTITUTIONAL LEAD PLAINTIFF IN THE TOP 100



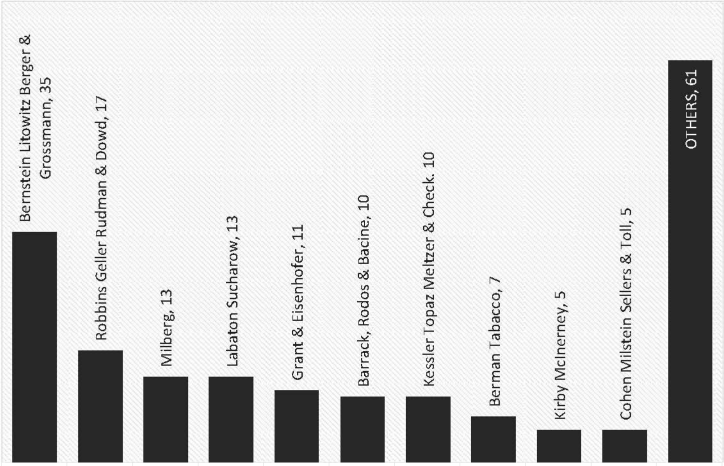
INSTITUTIONAL LEAD PLAINTIFFS PARTICIPATION

Most Frequent Institutional Lead Plaintiff in Top 100 Settlements

INSTITUTIONAL LEAD PLAINTIFF | CASE NAME	RANK	TOTAL SETTLEMENT AMOUNT	NUMBER OF SETTLEMENTS
State Teachers Retirement System of Ohio		**$5,592,300,000**	**8**
Bank of America Corporation	7	$2,425,000,000	
American International Group, Inc.	14	$1,009,500,000	
Merrill Lynch & Co., Inc.	33	$475,000,000	
Global Crossing, Ltd.	38	$447,800,000	
Federal Home Loan Mortgage Corp. (Freddie Mac)	40	$410,000,000	
Marsh & McLennan Companies, Inc.	41	$400,000,000	
Allergan, Inc.	68	$250,000,000	
BP p.l.c.	92	$175,000,000	
New York State Common Retirement Fund		**$11,368,450,714**	**6**
WorldCom, Inc.	2	$6,194,100,714	
Cendant Corp.	3	$3,319,350,000	
McKesson HBOC Inc.	13	$1,052,000,000	
Raytheon Company	36	$460,000,000	
BP p.l.c.	92	$175,000,000	
National City Corp.	97	$168,000,000	
Public Employees' Retirement System of Mississippi		**$2,332,750,000**	**5**
Merck & Co., Inc.	12	$1,062,000,000	
Schering-Plough Corp.	35	$473,000,000	
Merrill Lynch Mortgage Investors, Inc.	50	$315,000,000	
J.P. Morgan Acceptance Corp. I	61	$280,000,000	
The Mills Corp.	82	$202,750,000	
Ohio Public Employees Retirement System		**$4,467,300,000**	**5**
Bank of America Corporation	7	$2,425,000,000	
American International Group, Inc.	14	$1,009,500,000	
Global Crossing, Ltd.	38	$447,800,000	
Federal Home Loan Mortgage Corp. (Freddie Mac)	40	$410,000,000	
BP p.l.c.	92	$175,000,000	
Teachers' Retirement System of Louisiana		**$4,186,000,000**	**4**

INSTITUTIONAL LEAD PLAINTIFF | CASE NAME	RANK	TOTAL SETTLEMENT AMOUNT	NUMBER OF SETTLEMENTS
Tyco International, Ltd.	4	$3,200,000,000	
Pfizer, Inc.	30	$486,000,000	
Bristol-Myers Squibb Co.	54	$300,000,000	
WellCare Health Plans, Inc.	83	$200,000,000	
New Mexico State Investment Council		**$1,778,000,000**	**4**
HealthSouth Corp.	17	$804,500,000	
Cardinal Health, Inc.	24	$600,000,000	
WellCare Health Plans, Inc.	83	$200,000,000	
Broadcom Corp.	93	$173,500,000	

MOST FREQUENT LEAD COUNSEL IN THE TOP 100[2]



[2] Totals exceed 100 as a number of Top 100 settlements include more than one law firm as lead counsel.

LEAD COUNSEL PARTICIPATION

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

LEAD / CO-LEAD COUNSEL | CASE NAME	RANK	TOTAL SETTLEMENT AMOUNT
Bernstein Litowitz Berger & Grossmann		**$25,572,491,840**
WorldCom, Inc.	2	$6,194,100,714
Cendant Corp.	3	$3,319,350,000
Bank of America Corporation	7	$2,425,000,000
Nortel Networks Corp. (II)	11	$1,074,265,298
Merck & Co., Inc.	12	$1,062,000,000
McKesson HBOC Inc.	13	$1,052,000,000
HealthSouth Corp.	17	$804,500,000
Lehman Brothers Holdings, Inc.	19	$735,218,000
Citigroup Bonds	20	$730,000,000
Lucent Technologies, Inc.	21	$667,000,000
Wachovia Preferred Securities and Bond/Notes	22	$627,000,000
Bear Stearns Mortgage Pass-Through Certificates	27	$500,000,000
Wells Fargo & Company	31	$480,000,000
Schering-Plough Corp.	35	$473,000,000
Federal Home Loan Mortgage Corp. (Freddie Mac)	40	$410,000,000
Refco, Inc.	45	$358,300,000
Merrill Lynch Mortgage Investors, Inc.	50	$315,000,000
Williams Companies, Inc.	51	$311,000,000
General Motors Company	54	$300,000,000
Bristol-Myers Squibb Co.	54	$300,000,000
DaimlerChrysler AG	54	$300,000,000
El Paso Corporation	59	$285,000,000
J.P. Morgan Acceptance Corp. I	61	$280,000,000
3Com Corp.	67	$259,000,000

LEAD / CO-LEAD COUNSEL | CASE NAME	RANK	TOTAL SETTLEMENT AMOUNT
Allergan, Inc.	68	$250,000,000
MF Global Holdings Ltd.	71	$234,257,828
Genworth Financial, Inc.	75	$219,000,000
Washington Mutual, Inc.	76	$216,750,000
Merck & Co., Inc.	77	$215,000,000
Wilmington Trust Corporation	80	$210,000,000
Salix Pharmaceuticals, Ltd.	80	$210,000,000
The Mills Corp.	82	$202,750,000
WellCare Health Plans, Inc.	83	$200,000,000
The Bank of New York Mellon Corporation	91	$180,000,000
Maxim Integrated Products, Inc.	94	$173,000,000
Robbins Geller Rudman & Dowd		**$15,297,050,000**
Enron Corp.	1	$7,242,000,000
Household International, Inc.	8	$1,575,000,000
UnitedHealth Group, Inc.	16	$925,500,000
HealthSouth Corp.	17	$804,500,000
Wachovia Preferred Securities and Bond/Notes	22	$627,000,000
Cardinal Health, Inc.	24	$600,000,000
Countrywide Financial Corp.	27	$500,000,000
Dynegy Inc.	34	$474,050,000
Qwest Communications International, Inc.	39	$445,000,000
Pfizer, Inc.	41	$400,000,000
J.P. Morgan Acceptance Corp. I	43	$388,000,000
GS Mortgage Securities Corp.	65	$272,000,000
Massey Energy Company	66	$265,000,000
HCA Holdings, Inc.	77	$215,000,000
Kinder Morgan, Inc.	83	$200,000,000
Motorola, Inc.	83	$200,000,000
Pharmacia Corp.	100	$164,000,000

LEAD / CO-LEAD COUNSEL | CASE NAME	RANK	TOTAL SETTLEMENT AMOUNT
Barrack, Rodos & Bacine		**$13,272,700,714**
WorldCom, Inc.	2	$6,194,100,714
Cendant Corp.	3	$3,319,350,000
McKesson HBOC Inc.	13	$1,052,000,000
American International Group, Inc.	15	$970,500,000
Merrill Lynch & Co., Inc.	33	$475,000,000
Bank of America Corporation	47	$335,000,000
DaimlerChrysler AG	54	$300,000,000
3Com Corp.	67	$259,000,000
The Mills Corp.	82	$202,750,000
Schering-Plough Corp.	98	$165,000,000
Milberg		**$9,353,855,304**
Tyco International, Ltd.	4	$3,200,000,000
Nortel Networks Corp.I	9	$1,142,775,308
Merck & Co., Inc.	12	$1,062,000,000
Xerox Corp.	18	$750,000,000
Lucent Technologies, Inc.	21	$667,000,000
IPO Securities Litigation (Master Case)	26	$585,999,996
Raytheon Company	36	$460,000,000
Rite Aid Corp.	49	$319,580,000
Oxford Health Plans Inc.	54	$300,000,000
3Com Corp.	67	$259,000,000
Sears, Roebuck & Co.	77	$215,000,000
CMS Energy Corp.	83	$200,000,000
MicroStrategy Inc.	88	$192,500,000
Kessler Topaz Meltzer & Check		**$ 9,104,575,690**
Tyco International, Ltd.	4	$ 3,200,000,000
Bank of America Corporation	7	$ 2,425,000,000
Lehman Brothers Holdings, Inc.	19	$735,218,000

LEAD / CO-LEAD COUNSEL | CASE NAME	RANK	TOTAL SETTLEMENT AMOUNT
Wachovia Preferred Securities and Bond/Notes	22	$627,000,000
IPO Securities Litigation	26	$585,999,996
Countrywide Financial Corp.	27	$500,000,000
Tenet Healthcare Corp.	60	$281,500,000
BNY Mellon, N.A.	61	$280,000,000
Allergan, Inc.	68	$250,000,000
Bernard L. Madoff Investment Securities LLC	74	$219,857,694
Grant & Eisenhofer		**$6,372,722,944**
Tyco International, Ltd.	4	$3,200,000,000
Pfizer, Inc.	30	$486,000,000
Global Crossing, Ltd.	38	$447,800,000
Marsh & McLennan Companies, Inc.	41	$400,000,000
Refco, Inc.	45	$358,300,000
General Motors Corp.	53	$303,000,000
DaimlerChrysler AG	54	$300,000,000
Oxford Health Plans Inc.	54	$300,000,000
Merck & Co., Inc.	77	$215,000,000
Safety-Kleen Corp.	87	$197,622,944
Digex, Inc.	98	$165,000,000
Labaton Sucharow		**$5,244,400,000**
American International Group, Inc.	14	$1,009,500,000
HealthSouth Corp.	17	$804,500,000
Countrywide Financial Corp.	23	$624,000,000
Schering-Plough Corp.	35	$473,000,000
Waste Management Inc.	37	$457,000,000
General Motors Corp.	53	$303,000,000
Bear Stearns Companies, Inc.	58	$294,900,000
El Paso Corporation	59	$285,000,000
Massey Energy Company	66	$265,000,000

LEAD / CO-LEAD COUNSEL | CASE NAME	RANK	TOTAL SETTLEMENT AMOUNT
WellCare Health Plans, Inc.	83	$200,000,000
Bristol-Myers Squibb Co.	90	$185,000,000
Broadcom Corp.	93	$173,500,000
Federal National Mortgage Association (Fannie Mae)	95	$170,000,000
Kaplan Fox & Kilsheimer		**$3,329,000,000**
Bank of America Corporation	7	$2,425,000,000
Merrill Lynch & Co., Inc.	33	$475,000,000
3Com Corp.	67	$259,000,000
Federal National Mortgage Association (Fannie Mae)	95	$170,000,000
Pomerantz		**$3,225,000,000**
Petroleo Brasileiro S.A. - Petrobras	5	$3,000,000,000
Comverse Technology, Inc.	72	$225,000,000
Heins Mills & Olson		**$2,500,000,000**
AOL Time Warner, Inc.	6	$2,500,000,000
Berman Tabacco		**$2,320,900,000**
Xerox Corp.	18	$750,000,000
IndyMac Mortgage Pass-Through Certificates	46	$346,000,000
Bristol-Myers Squibb Co.	54	$300,000,000
Bear Stearns Companies, Inc.	58	$294,900,000
El Paso Corporation	59	$285,000,000
BP p.l.c.	92	$175,000,000
Federal National Mortgage Association (Fannie Mae)	95	$170,000,000
Stull Stull & Brody		**$2,137,999,996**
Merck & Co., Inc.	12	$1,062,000,000
IPO Securities Litigation (Master Case)	26	$585,999,996
BankAmerica Corp.	29	$490,000,000
Kirby McInerney		**$1,830,725,000**
Citigroup, Inc.	25	$590,000,000
Adelphia Communications Corp.	32	$478,725,000

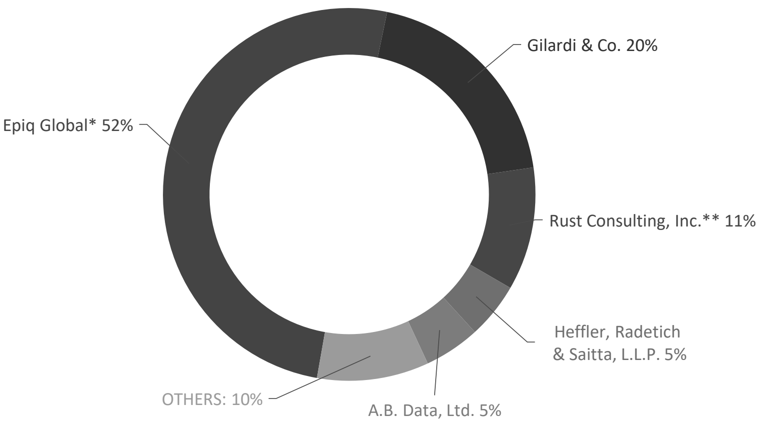
LEAD / CO-LEAD COUNSEL | CASE NAME	RANK	TOTAL SETTLEMENT AMOUNT
Cendant Corp. II	44	$374,000,000
Waste Management Inc.	73	$220,000,000
National City Corp.	97	$168,000,000
Cohen Milstein Sellers & Toll		**$1,785,000,000**
Bear Stearns Mortgage Pass-Through Certificates	27	$500,000,000
Countrywide Financial Corp.	27	$500,000,000
RALI Mortgage (Asset-Backed Pass-Through Certificates)	47	$335,000,000
HarborView Mortgage Loan Trust	63	$275,000,000
BP p.l.c.	92	$175,000,000
Entwistle & Cappucci		**$1,600,000,000**
Royal Ahold, N.V.	10	$1,100,000,000
DaimlerChrysler AG	54	$300,000,000
CMS Energy Corp.	83	$200,000,000
Brower Piven		**$1,062,000,000**
Merck & Co., Inc.	12	$1,062,000,000
Berger & Montague		**$1,014,580,000**
Merrill Lynch & Co., Inc.	33	$475,000,000
Rite Aid Corp.	49	$319,580,000
Waste Management Inc.	73	$220,000,000
Hahn Loeser & Parks		**$1,009,500,000**
American International Group, Inc.	14	$1,009,500,000
Bernstein Liebhard		**$985,999,996**
IPO Securities Litigation (Master Case)	26	$585,999,996
Marsh & McLennan Companies, Inc.	41	$400,000,000
The Miller Law Firm		**$970,500,000**
American International Group, Inc.	15	$970,500,000
Abbey Spanier Rodd Abrams & Paradis		**$968,725,000**
BankAmerica Corp.	29	$490,000,000
Adelphia Communications Corp.	32	$478,725,000

LEAD / CO-LEAD COUNSEL | CASE NAME	RANK	TOTAL SETTLEMENT AMOUNT
Chitwood Harley Harnes		**$963,000,000**
BankAmerica Corp.	29	$490,000,000
Oxford Health Plans Inc.	54	$300,000,000
Maxim Integrated Products, Inc.	94	$173,000,000
Cunningham Bounds		**$804,500,000**
HealthSouth Corp.	17	$804,500,000
Wolf Haldenstein Adler Freeman & Herz		**$778,499,996**
IPO Securities Litigation (Master Case)	26	$585,999,996
MicroStrategy Inc.	88	$192,500,000
Johnson & Perkinson		**$750,000,000**
Xerox Corp.	18	$750,000,000
Girard Gibbs		**$735,218,000**
Lehman Brothers Holdings, Inc.	19	$735,218,000
Wolf Popper		**$705,250,000**
J.P. Morgan Acceptance Corp. I	61	$280,000,000
Bernard L. Madoff Investment Securities LLC	69	$235,250,000
Motorola, Inc.	89	$190,000,000
Howard B. Sirota, Esq.		**$585,999,996**
IPO Securities Litigation (Master Case)	26	$585,999,996
Green Schaaf & Jacobson		**$490,000,000**
BankAmerica Corp.	29	$490,000,000
Motley Rice		**$480,000,000**
Wells Fargo & Company	31	$480,000,000
Lite, DePalma, Greenberg & Rivas		**$471,500,000**
Tenet Healthcare Corp.	60	$281,500,000
Motorola, Inc.	89	$190,000,000
Bleichmar Fonti Tountas & Auld		**$453,257,828**
MF Global Holdings Ltd.	71	$234,257,828
Genworth Financial, Inc.	75	$219,000,000

LEAD / CO-LEAD COUNSEL | CASE NAME	RANK	TOTAL SETTLEMENT AMOUNT
Barrett & Weber		**$410,000,000**
Federal Home Loan Mortgage Corp. (Freddie Mac)	40	$410,000,000
Waite, Schneider, Bayless & Chesley		**$410,000,000**
Federal Home Loan Mortgage Corp. (Freddie Mac)	40	$410,000,000
Lowey Dannenberg Cohen & Hart		**$389,357,694**
Bernard L. Madoff Investment Securities LLC	74	$219,857,694
Juniper Networks, Inc.	96	$169,500,000
Susman Godfrey		**$311,000,000**
Williams Companies, Inc.	51	$311,000,000
Francis Law		**$310,000,000**
Caremark, Rx, Inc. f/k/a MedPartners, Inc.	52	$310,000,000
Somerville		**$310,000,000**
Caremark, Rx, Inc. f/k/a MedPartners, Inc.	52	$310,000,000
Hare, Wynn, Newell & Newton		**$310,000,000**
Caremark, Rx, Inc. f/k/a MedPartners, Inc.	52	$310,000,000
Nix, Patterson & Roach		**$280,000,000**
BNY Mellon, N.A.	61	$280,000,000
Friedlander & Gorris		**$275,000,000**
Activision Blizzard, Inc.	63	$275,000,000
Bragar Eagel & Squire		**$275,000,000**
Activision Blizzard, Inc.	63	$275,000,000
Boies, Schiller & Flexner		**$235,250,000**
Bernard L. Madoff Investment Securities LLC	69	$235,250,000
Lovell Stewart Halebian Jacobson		**$235,250,000**
Bernard L. Madoff Investment Securities LLC	69	$235,250,000
Hagens Berman Sobol Shapiro		**$235,000,000**
Charles Schwab & Co., Inc.	70	$235,000,000
Abbey, Gardy & Squitieri		**$220,000,000**
Waste Management Inc.	73	$220,000,000

LEAD / CO-LEAD COUNSEL | CASE NAME	RANK	TOTAL SETTLEMENT AMOUNT
Saxena White		**$210,000,000**
Wilmington Trust Corporation	80	$210,000,000
The Nygaard Law Firm		**$200,000,000**
Kinder Morgan, Inc.	83	$200,000,000
Chimicles & Tikellis		**$200,000,000**
Kinder Morgan, Inc.	83	$200,000,000
Block & Leviton		**$175,000,000**
BP p.l.c.	92	$175,000,000

MOST FREQUENT CLAIMS ADMINISTRATOR IN THE TOP 100[3]



[3] Totals exceed 100 as a number of Top 100 settlements include more than one claims administrator.

**Includes settlements under Garden City Group, Epiq Systems, Inc. and Epiq Class Action & Claims Solutions, Inc. (in June of 2018, Epiq Global acquired Garden City Group).*
***Includes settlement under Complete Claim Solutions, Inc.*

CLAIMS ADMINISTRATOR PARTICIPATION CLAIMS ADMINISTRATOR | CASE NAME	RANK	CASE SETTLEMENT AMOUNT	TOTAL AMOUNT SETTLED
Epiq Global			**$33,970,597,782**
WorldCom, Inc.	2	$6,194,100,714	
Tyco International, Ltd.	4	$3,200,000,000	
Petroleo Brasileiro S.A. – Petrobras	5	$3,000,000,000	
Bank of America Corporation	7	$2,425,000,000	
Nortel Networks Corp.	9	$1,142,775,308	
Royal Ahold, N.V.	10	$1,100,000,000	
Nortel Networks Corp.	11	$1,074,265,298	
Merck & Co., Inc.	12	$1,062,000,000	
Citigroup Bonds	20	$730,000,000	
Lucent Technologies, Inc.	21	$667,000,000	
Wachovia Preferred Securities and Bond/Notes	22	$627,000,000	
Lehman Brothers Holdings, Inc.	19	$615,218,000	
Citigroup, Inc.	25	$590,000,000	
IPO Securities Litigation	26	$585,999,996	
Countrywide Financial Corp.	27	$500,000,000	
Bear Stearns Mortgage Pass-Through Certificates	27	$500,000,000	
Pfizer, Inc.	30	$486,000,000	
Wells Fargo & Company	31	$480,000,000	
Schering-Plough Corp.	35	$473,000,000	
Global Crossing, Ltd.	38	$447,800,000	
Federal Home Loan Mortgage Corp. (Freddie Mac)	40	$410,000,000	
Refco, Inc.	45	$358,300,000	
RALI Mortgage (Asset-Backed Pass-Through Certificates)	47	$335,000,000	
Merrill Lynch Mortgage Investors, Inc.	50	$315,000,000	
Williams Companies, Inc.	51	$311,000,000	
General Motors Corp.	53	$303,000,000	
DaimlerChrysler AG	54	$300,000,000	
Bristol-Myers Squibb Co.	54	$300,000,000	
General Motors Company	54	$300,000,000	
Oxford Health Plans Inc.	54	$300,000,000	
Bear Stearns Companies, Inc.	58	$294,900,000	

CLAIMS ADMINISTRATOR PARTICIPATION CLAIMS ADMINISTRATOR | CASE NAME	RANK	CASE SETTLEMENT AMOUNT	TOTAL AMOUNT SETTLED
Tenet Healthcare Corp.	60	$281,500,000	
J.P. Morgan Acceptance Corp. I	61	$280,000,000	
BNY Mellon, N.A.	61	$280,000,000	
Allergan, Inc.	68	$250,000,000	
MF Global Holdings Ltd.	71	$234,257,828	
Bernard L. Madoff Investment Securities LLC	74	$219,857,694	
Genworth Financial, Inc.	75	$219,000,000	
Washington Mutual, Inc.	76	$216,750,000	
Merck & Co., Inc.	77	$215,000,000	
Sears, Roebuck & Co.	77	$215,000,000	
Wilmington Trust Corporation	80	$210,000,000	
Salix Pharmaceuticals, Ltd.	80	$210,000,000	
The Mills Corp.	82	$202,750,000	
Kinder Morgan, Inc.	83	$200,000,000	
WellCare Health Plans, Inc.	83	$200,000,000	
CMS Energy Corp.	83	$200,000,000	
Safety-Kleen Corp.	87	$197,622,944	
Bristol-Myers Squibb Co.	90	$185,000,000	
The Bank of New York Mellon Corporation	91	$180,000,000	
Broadcom Corp.	93	$173,500,000	
Maxim Integrated Products, Inc.	94	$173,000,000	
Gilardi & Co.			**$18,437,130,000**
Enron Corp.	1	$7,242,000,000	
AOL Time Warner, Inc.	6	$2,500,000,000	
Household International, Inc.	8	$1,575,000,000	
American International Group, Inc.	15	$970,500,000	
UnitedHealth Group, Inc.	16	$925,500,000	
Xerox Corp.	18	$750,000,000	
Cardinal Health, Inc.	24	$600,000,000	
Dynegy Inc.	34	$474,050,000	
Qwest Communications International, Inc.	39	$445,000,000	
Pfizer, Inc.	41	$400,000,000	
J.P. Morgan Acceptance Corp. I	43	$388,000,000	

ISS Securities Class Action Services

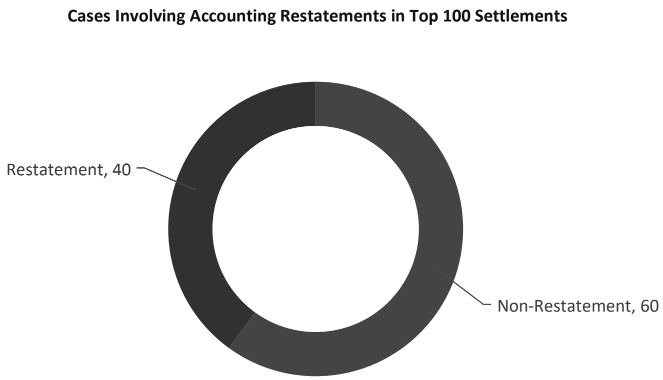
CLAIMS ADMINISTRATOR PARTICIPATION CLAIMS ADMINISTRATOR | CASE NAME	RANK	CASE SETTLEMENT AMOUNT	TOTAL AMOUNT SETTLED
Rite Aid Corp.	49	$319,580,000	
Caremark, Rx, Inc. f/k/a MedPartners, Inc.	52	$310,000,000	
GS Mortgage Securities Corp.	65	$272,000,000	
3Com Corp.	67	$259,000,000	
Charles Schwab & Co., Inc.	70	$235,000,000	
HCA Holdings, Inc.	77	$215,000,000	
Motorola, Inc.	83	$200,000,000	
MicroStrategy Inc.	88	$192,500,000	
Pharmacia Corp.	100	$164,000,000	
Rust Consulting, Inc.			**$4,710,750,000**
American International Group, Inc.	14	$912,000,000	
HealthSouth Corp.	17	$804,500,000	
Countrywide Financial Corp.	23	$624,000,000	
Merrill Lynch & Co., Inc.	33	$475,000,000	
Waste Management Inc.	37	$457,000,000	
Marsh & McLennan Companies, Inc.	41	$400,000,000	
IndyMac Mortgage Pass-Through Certificates	46	$346,000,000	
Bernard L. Madoff Investment Securities LLC	69	$235,250,000	
Motorola, Inc.	89	$190,000,000	
Juniper Networks, Inc.	96	$169,500,000	
American International Group, Inc.[4]	14	$97,500,000	
Heffler, Radetich & Saitta, L.L.P.			**$4,529,350,000**
Cendant Corp.	3	$3,319,350,000	
BankAmerica Corp.	29	$490,000,000	
Bank of America Corporation	47	$335,000,000	
Waste Management Inc.	73	$220,000,000	
Schering-Plough Corp.	98	$165,000,000	
Analytics, Inc.			**$1,502,500,000**
McKesson HBOC Inc.[5]	13	$1,042,500,000	
Raytheon Company	36	$460,000,000	
A.B. Data, Ltd.			**$1,015,000,000**

[4] Partial administration under Complete Claim Solutions, Inc.
[5] Partial administration on the full settlement of the Action.

CLAIMS ADMINISTRATOR PARTICIPATION CLAIMS ADMINISTRATOR | CASE NAME	RANK	CASE SETTLEMENT AMOUNT	TOTAL AMOUNT SETTLED
El Paso Corporation	59	$285,000,000	
Massey Energy Company	66	$265,000,000	
BP p.l.c.	92	$175,000,000	
Federal National Mortgage Association (Fannie Mae)	95	$170,000,000	
Lehman Brothers Holdings, Inc.[6]	19	$120,000,000	
Valley Forge Administrative Services, Inc.			**$852,725,000**
Adelphia Communications Corp.	32	$478,725,000	
Cendant Corp. II	44	$374,000,000	
Kurtzman Carson Consultants			**$550,000,000**
HarborView Mortgage Loan Trust	63	$275,000,000	
Activision Blizzard, Inc.	63	$275,000,000	
Berdon Claims Administration LLC			**$225,000,000**
Comverse Technology, Inc.	72	$225,000,000	
BMC Group			**$177,500,000**
National City Corp.	97	$168,000,000	
McKesson HBOC Inc.[7]	13	$9,500,000	
Digex, Inc.			**$165,000,000**
Digex, Inc.	98	$165,000,000	

[6] Partial administration on the full settlement of the Action.
[7] Partial administration on the full settlement of the Action.

CASES INVOLVING ACCOUNTING RESTATEMENTS IN THE TOP 100 SETTLEMENTS

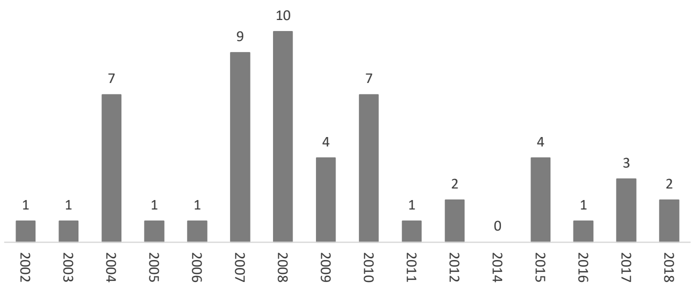


RESTATEMENTS IN THE TOP 100

RANK	COMPANY NAME	FINAL SETTLEMENT AMOUNT	SETTLEMENT YEAR
1	Enron Corp.	$7,242,000,000	2010
2	WorldCom, Inc.	$6,194,100,714	2012
3	Cendant Corp.	$3,319,350,000	2000
4	Tyco International, Ltd.	$3,200,000,000	2007
5	Petroleo Brasileiro S.A. - Petrobras	$3,000,000,000	2018
6	AOL Time Warner, Inc.	$2,500,000,000	2006
9	Nortel Networks Corp.	$1,142,775,308	2006
10	Royal Ahold, N.V.	$1,100,000,000	2006
11	Nortel Networks Corp.	$1,074,265,298	2006
13	McKesson HBOC Inc.	$1,052,000,000	2013
14	American International Group, Inc.	$1,009,500,000	2013
15	American International Group, Inc.	$970,500,000	2015
16	UnitedHealth Group, Inc.	$925,500,000	2009

RANK	COMPANY NAME	FINAL SETTLEMENT AMOUNT	SETTLEMENT YEAR
17	HealthSouth Corp.	$804,500,000	2010
18	Xerox Corp.	$750,000,000	2009
21	Lucent Technologies, Inc.	$667,000,000	2003
23	Countrywide Financial Corp.	$624,000,000	2011
24	Cardinal Health, Inc.	$600,000,000	2007
32	Adelphia Communications Corp.	$478,725,000	2013
37	Waste Management Inc.	$457,000,000	2003
38	Global Crossing, Ltd.	$447,800,000	2007
39	Qwest Communications International, Inc.	$445,000,000	2009
40	Federal Home Loan Mortgage Corp. (Freddie Mac)	$410,000,000	2006
45	Refco, Inc.	$358,300,000	2011
49	Rite Aid Corp.	$319,580,000	2003
53	General Motors Corp.	$303,000,000	2009
54	Bristol-Myers Squibb Co.	$300,000,000	2004
59	El Paso Corporation	$285,000,000	2007
67	3Com Corp.	$259,000,000	2001
72	Comverse Technology, Inc.	$225,000,000	2010
73	Waste Management Inc.	$220,000,000	1999
82	The Mills Corp.	$202,750,000	2009
83	CMS Energy Corp.	$200,000,000	2007
83	WellCare Health Plans, Inc.	$200,000,000	2011
87	Safety-Kleen Corp.	$197,622,944	2006
88	MicroStrategy Inc.	$192,500,000	2001
93	Broadcom Corp.	$173,500,000	2012
94	Maxim Integrated Products, Inc.	$173,000,000	2010
95	Federal National Mortgage Association (Fannie Mae)	$170,000,000	2015
96	Juniper Networks, Inc.	$169,500,000	2010

NUMBER OF SETTLEMENTS ADDED TO TOP 50 SEC DISGORGEMENTS[8]



TOP 50 SEC DISGORGEMENTS

Cases Listed in Top 50 Disgorgements Categorized by Settlement Amount

RANK	COMPANY NAME	SETTLEMENT YEAR	TOTAL SETTLEMENT AMOUNT
1	American International Group, Inc.	2008	$800,000,000
2	WorldCom, Inc.	2003	$750,000,000
3	Wyeth/Elan Corporation, plc	2016	$601,832,697
4	BP p.l.c.	2012	$525,000,000
5	Enron Corp.	2008	$450,000,000
6	Stanford International Bank Ltd.	2018	$398,753,165
7	Banc of America Capital Management, LLC	2007	$375,000,000
8	Federal National Mortgage Association	2007	$350,000,001
9	Invesco Funds	2008	$325,000,000
10	Time Warner Inc.	2005	$308,000,000

[8] There are 54 companies listed within the Top 50 SEC Disgorgements as five companies are tied with the 50th largest pay-outs.

RANK	COMPANY NAME	SETTLEMENT YEAR	TOTAL SETTLEMENT AMOUNT
11	Citigroup Global Markets Inc.	2017	$287,550,000
12	Prudential Securities	2010	$270,000,000
13	Qwest Communications International Inc.	2006	$252,869,388
14	Alliance Capital Management L.P.	2008	$250,000,000
14	PBHG Mutual Funds	2004	$250,000,000
14	Bear Stearns	2008	$250,000,000
17	NYSE Specialist Firms	2004	$247,557,022
18	Jay Peak Receivership Entities	2018	$234,934,964
19	Massachusetts Financial Services Co.	2007	$225,629,142
20	J.P. Morgan Securities LLC	2017	$222,415,536
21	JPMorgan Chase & Co.	2015	$200,000,000
22	Computer Sciences Corporation	2015	$190,948,983
23	Millennium Partners, L.P.	2007	$180,575,005
24	Putnam Investment Management, LLC	2007	$153,524,387
25	Bristol-Myers Squibb Co.	2004	$150,000,001
25	Bank of America Corporation	2010	$150,000,001
27	Strong Capital Management, Inc.	2009	$140,750,000
28	Columbia Funds	2007	$140,000,000
29	American International Group, Inc.	2004	$126,366,000
30	Canadian Imperial Holdings Inc./CIBC World Markets Corp.	2010	$125,000,000
31	Royal Dutch Petroleum / Shell Transport	2008	$120,000,000
32	Charles Schwab Investment	2011	$110,000,000
33	Convergex Global Markets	2015	$109,440,738
34	Credit Suisse Securities	2012	$101,747,769
35	Capital Consultants, LLC	2002	$100,000,000
35	HealthSouth Corp.	2007	$100,000,000
35	Janus Capital Management LLC	2008	$100,000,000
38	Adelphia Communications Corp.	2009	$95,000,000

RANK	COMPANY NAME	SETTLEMENT YEAR	TOTAL SETTLEMENT AMOUNT
39	Edward D. Jones & Co.	2004	$75,000,000
40	J.P. Morgan Securities LLC	2017	$74,500,000
41	Federated Funds	2010	$72,000,000
42	American Skandia Investment Services, Inc.	2010	$68,000,000
43	Knight Securities, L.P.	2004	$66,841,731
44	Focus Media Holding Limited	2015	$55,627,865
45	PIMCO Equity Funds	2010	$55,479,005
46	Vivendi Universal, S.A.	2004	$51,268,151
47	Federal Home Loan Mortgage Corporation	2007	$50,755,388
48	Tyco International Ltd.	2010	$50,000,001
48	MBIA, Inc.	2008	$50,000,001
50	Adelphia Communications Corp.	2009	$50,000,000
50	Franklin Advisers, Inc.	2008	$50,000,000
50	Banc One Investment Advisors Corp.	2007	$50,000,000
50	AIM Advisors, Inc. / AIM Distributors, Inc.	2008	$50,000,000
50	McAfee, Inc.	2009	$50,000,000

GLOSSARY

CLAIMS ADMINISTRATOR	An entity selected by the Lead Counsel or appointed by the court to manage the settlement notification and claim process.
DISGORGEMENT	A repayment of ill-gotten gains that is imposed on wrong-doers by the courts.
FINAL SETTLEMENTS	Settlements that received final approval from the court.
INSTITUTIONAL LEAD PLAINTIFF	An institutional shareholder or group of institutional shareholders appointed by the court to represent the interests of a class or classes of similarly situated shareholders.
LEAD COUNSEL	Law firm, or lawyer, appointed by the court, that prosecutes a class action on behalf of the class members.
PARTIAL SETTLEMENT	A preliminary agreement between some of the identified defendants in the action.
PSLRA (PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995)	Legislation passed by Congress that implemented several substantive changes in the United States, affecting certain cases brought under the federal securities laws, including changes related to pleading, discovery, liability, class representation, and awards fees and expenses.
SETTLEMENT YEAR	Corresponds to the year the settlement, or the most recent partial settlement, received final approval from the Court.
TOTAL SETTLEMENT AMOUNT	Refers to the sum of the settlement fund or the gross settlement fund approved by the court.

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NOTES

NOTES

8

Recent Noteworthy Class Action Decisions (Spring 2019)

Michael T. Brody
Howard S. Suskin
Jenner & Block LLP

- **Amendments To Rules Of Civil Procedure Affect Class Action Practice.**

  On December 1, 2018, amendments to various federal rules of civil procedure took effect. The new rules implement changes to Rule 23. Some of these changes appear intended to conform the rules to existing practice. For example, amendments to Rule 23(e) direct the district court to consider various aspects of a proposed settlement in deciding whether to approve the settlement. Most courts already engaged in this practice. Another new rule, which has received relatively little attention, may prove to be more impactful. Rule 23(e)(5)(B) and (C) already required court approval for payments in connection with an objection. The amended Rule provides that "[u]nless approved by the court after a hearing, no payment or other consideration may be provided" in connection with "forgoing or withdrawing an objection," or "forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal." The Rule includes procedures to permit the district court to consider such proposals after final judgment if the case is on appeal. If adhered to, this amended rule will require disclosure of payments to objectors to forgo an objection. This rule may make less frequent the practice of objectors seeking to extract payments from class counsel in exchange for "forgoing" an objection (the prior rule only applied to withdrawing objections). In addition, by extending the disclosure requirement to appeals, the rule will lessen the incentive of an objector to appeal the approval of a settlement and use the pending appeal, which in some circuits may take years to resolve, to extract a payment from class counsel.

- **Court Presumptively Is To Determine If Class Arbitration Is Permitted.**

  The U.S. Court of Appeals for the Eleventh Circuit, in a case of first impression by that court, addressed the issue passed over by the Tenth Circuit in *Dish Network* and held that availability of a class action in an arbitration is a gateway question of arbitrability that presumptively goes to the court. *JPay, Inc. v. Kobel*, No. 17-13611 (11th Cir. Sept. 19, 2018). However, like the Tenth Circuit in *Dish Network*, the Eleventh Circuit concluded that the language the parties used in their contract expressed their clear intent to overcome the default presumption and to arbitrate gateway questions of arbitrability, including the availability of class arbitration. Like the Tenth Circuit, the Eleventh Circuit relied on the parties' contract's incorporation of the rules of the American Arbitration Association, which delegates broad powers to the arbitrator. The Eleventh Circuit also noted that the parties had agreed "to arbitrate any and all such disputes, claims and controversies" as further support for its conclusion that availability of class arbitration should be a decision left to the arbitrator.

- **FLSA Claims May Be Compelled To Be Arbitrated On An Individual Basis.**

  The U.S. Court of Appeals for the Sixth Circuit rejected an employee's challenge to an arbitration agreement requiring individual arbitration of FLSA claims. *Gaffers v. Kelly Services, Inc.*, No. 16-2210 (6th Cir. Aug. 15, 2018). Relying on the U.S. Supreme Court's decision in Epic Systems Corp. v. Lewis, 138 S.Ct. 1612 (2018), which rejected a similar challenge with regard to claims under the National Labor Relations Act, the court of appeals held that FLSA claims may be compelled to be arbitrated individually pursuant to employees' arbitration agreements that bar collective actions.

- **Eleventh Circuit Rules Availability Of Class Arbitration Presumptively For Court To Decide.**

  In *Jpay, Inc. v. Kobel*, No. 17-13611 (11th Cir. Sept. 19, 2018), the Eleventh Circuit decided as a matter of first impression that the availability of class arbitration is a "question of arbitrability" that presumptively is for a court to decide. The scope of arbitration will be decided by an arbitrator only if the parties' agreement "evinces a clear and unmistakable intent to overcome that presumption." In Jpay, plaintiffs sought arbitration on a classwide basis. Defendant asked the court to limit the arbitration to plaintiffs' individual claims. The district court agreed, holding nothing in the terms of the agreement rebutted the presumption that the court decides the availability of class arbitration. On the merits, it concluded class arbitration was not available. On appeal, the Eleventh Circuit agreed that the availability of class arbitration is presumptively for the court to decide. However, the court found that this arbitration agreement reflected a clear intent to overcome the default presumption because there was unmistakable evidence the parties intended for the arbitrator decide the scope of the arbitration proceeding. The arbitration clause stated that disputes were to be resolved by arbitration conducted under identified rules of the AAA. Under Eleventh Circuit precedent, this terminology serves as a delegation of questions of arbitrability to the arbitrator. Independently, the parties agreed that "the ability to arbitrate the dispute . . . shall likewise be determined in the arbitration" and the parties agreed "to arbitrate any and all . . . disputes," which the court found amounted to clear and unmistakable delegation of questions of arbitrability to the arbitrator.

- **Supreme Court Limits American Pipe Tolling To Subsequent Individual Actions.**

  In *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974), the Supreme Court held a pending class action tolls the statute of limitations for members of the class. If certification is denied, members of the class may exclude the period prior to the denial of certification from the limitations period and may thereafter intervene as individual plaintiffs in the case. In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Supreme Court extended this doctrine to permit a class member to file a new suit, rather than join an existing suit. Following these decisions, the lower courts were divided as to whether a pending class action tolled the limitations period for a class member to file a subsequent class action. Resolving this conflict, the Supreme Court held the answer is no – "*American Pipe* tolls the statute of limitations during the pendency of a putative class action," but it "does not permit the maintenance of a follow-on class action past expiration of the statute of limitations." *China Agritech, Inc. v. Resh*, No. 17-432 (U.S. June 11, 2018). In *China Agritech*, the district court denied certification of a class action and the parties settled the individual claim. The same lawyer filed a second class action within the statute of limitations. The district court again denied certification, and the action was settled on an individual basis. Thereafter, a new plaintiff represented by different counsel brought a third class action. The statute of limitations had since expired, but the plaintiff relied on *American Pipe* tolling. The Supreme Court found the third class action untimely. The Supreme Court rejected the reasoning of those lower courts that permitted subsequent class actions if certification of the prior class actions had been denied due to the adequacy of the plaintiff. To those courts, the prior adjudication did not address the appropriateness of certification, only the class representative. This detail made no difference to the Supreme Court. The Court held *American Pipe* tolling permits the tolling of the statute of limitations for individual actions only.

- **Seventh Circuit Rejects Consumer Fraud Claims Of Repeat Customers.**

  In Haywood v. Massage Envy Franchising, LLC, No. 17-2402 (7th Cir. April 10, 2018), plaintiffs alleged that defendant committed unfair and deceptive business practices by advertising and selling one hour massage sessions but providing massages that lasted only 50 minutes. Defendant argued its disclosures adequately advised customers that the remainder of the one-hour session would be spent on consultation and dressing. Plaintiff brought suit under the Illinois and Missouri consumer fraud statutes. The court found defendant's disclaimers were sufficient and neither plaintiff adequately alleged any improper practice caused a loss. One judge dissented, concluding the complaint adequately alleged causation and satisfied Rule 9(b)'s particularity requirement. One aspect of the decision merits particular discussion. Plaintiff Haywood made two visits to Massage Envy. The court concluded that she could not obtain relief based on her second visit because, after her initial visit, she could not plausibly allege that she was deceived regarding the length of the massage. This issue frequently arises in consumer class actions in which the claim asserts unfair or deceptive conduct, the nature of which was evident after an initial consumer contact. The court's ruling provides a sensible limitation on such claims. Particularly under statutes that require causation, a plaintiff cannot plausibly claim to remain deceived when that plaintiff's experience makes clear the nature of the defendant's practices.

- **Two Courts Of Appeal Find Standing In Data Breach Class Actions.**

  In In re Zappos.com, Inc. Customer Data Security Breach Litigation, No. 16-16860 (9th Cir. March 8, 2018), plaintiffs brought claims arising out of a data breach that affected 24 million shoppers. Reversing the lower court, the Ninth Circuit held plaintiffs had alleged a substantial risk the hackers will commit identity fraud or identity theft and that harm was fairly traceable to the challenged conduct. The court relied on its prior decision in *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010), in which the court held that an increased risk of future identity theft was sufficient for Article III standing because plaintiffs had alleged a credible threat of real and imminent harm. The Court concluded *Krottner* controlled Zappos. The threat of harm was real and immediate, particularly given the nature of the information taken. The Court rejected the argument that too much time had passed since the breach for any harm to be imminent. Jurisdiction, the court held, depends on the state of affairs at the time the action is brought.

In Diefenbach v. Barnes & Noble, Inc., No. 17-2408 (7th Cir. April 11, 2018), plaintiffs sought to collect damages resulting from an unauthorized breach of Barnes & Noble's computer system by which hackers obtained customer names, credit card numbers, expiration dates and PINs. Some customers lost the use of their funds while waiting for their banks to reverse unauthorized charges. Others spent money on credit monitoring or lost the value of time devoted to acquiring new account numbers and notifying businesses of those changes. The district court dismissed the claim, finding that plaintiffs did not adequately plead damages. The Seventh Circuit reversed. It held plaintiffs had standing to assert claims under Illinois and California law because the data theft may have led them to pay money for credit monitoring; the unauthorized withdrawals caused a loss of use, even if the banks later restored the amount; and class members needed to devote time to set things right. The court found that these types of inquiries support standing and justify money damages.

- **Supreme Court To Review Application Of American Pipe Doctrine To Later Class Action.**

  In *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974), and subsequent cases, the United States Supreme Court has held that the timely filing of a class action tolls the statute of limitations for subsequent individual claims brought by purported class members. A split in the Circuits has developed concerning whether *American Pipe* may be used to toll the limitations period to allow absent class members not only to pursue their own individual claims, but also to pursue claims of a putative class. In *Resch v. China Agritech, Inc.*, 857 F.3d 994 (9th Cir. May 24, 2017), the Ninth Circuit joined several other Circuits in finding the *American Pipe* doctrine tolls the limitations period for both individual and class claims. The United States Supreme Court has granted a petition for writ of certiorari to review whether the rule of American Pipe permits a class member to bring a subsequent class action outside of the otherwise applicable limitations period.

- **Ninth Circuit Rejects Multi-State Consumer Protection Settlement.**

  In *In re Hyundai and Kia Fuel Economy Litigation*, No. 15-56014 (9th Cir. Jan. 23, 2018), the district court approved a nationwide class action settlement resolving claims arising out of alleged misstatements made by defendants regarding the fuel efficiency of their automobiles. On appeal, the Ninth Circuit reversed and held the district court abused its discretion in concluding common questions predominated. The court observed that Rule 23(b)(3)'s predominance inquiry is "far more demanding" than Rule 23(a)'s commonality requirement. In determining whether predominance in a nationwide class action is defeated by state law variations, the class proponent must first establish if the forum state's substantive law may be constitutionally applied. If so, the court must use that state's choice of law rules to determine the applicable law. If class claims require adjudication under the laws of multiple states, the court must determine whether common questions still predominate, an issue on which the party seeking certification bears the burden. In *Hyundai*, the district court failed to determine whether variations in state laws defeated predominance. The district court further erred by failing to exclude from the class those individuals who had not been exposed to the materially misleading advertising. In particular, the record did not support the presumption that used car owners were exposed to and relied on the advertisements. One judge dissented, concluding the settlement should be affirmed. Among other things, the dissenting judge concluded that, contrary to the law of other circuits, the Ninth Circuit shifted the burden of proving whether foreign law governed from the proponent of foreign law to class counsel. The dissenting judge also concluded the majority misapplied the law applicable to the substantive claim.

- **Ninth Circuit Affirms Finding That ADA Class Lacked Commonality.**

  In *Civil Rights Education and Enforcement Center v. Hospitality Properties Trust*, No. 16-16269 (9th Cir. Aug. 9, 2017), plaintiffs sued defendant, a REIT, alleging defendant had failed to offer accessible transportation services at the hotels it operates, as required by the Americans with Disabilities Act (ADA). Plaintiffs moved to certify the class, which the district court denied because the practices of the 142 hotels managed by the REIT varied. The Ninth Circuit affirmed. It found the district court did not abuse its discretion in holding the class lacked commonality. There was no evidence defendant had discouraged hotel operators from complying with the ADA. In the absence of a policy or practice applicable to all hotels, the court found commonality lacking. One judge dissented, finding that the panel's ruling permitted defendant to evade the requirements of the ADA.

- **Minimal Settlement Relief Does Not Justify Class Counsel Fee.**

  In In Re Subway Footlong Sandwich Marketing and Sales Practices Litigation, No. 16-1662 (7th Cir. Aug. 25, 2017), plaintiff claimed he was deceived by a Subway sandwich marketed as a foot-long sandwich that was actually only 11 inches long. Discovery showed that all Subway sandwiches were identical – the unbaked bread-sticks were uniform, the meat, cheese, and other ingredients were standardized – and the variation in sandwich size was attributable to the baking process. With no compensable injury, the parties reached an injunctive settlement and agreed to fees of $525,000. Frequent objector Ted Frank objected, arguing the settlement enriched only the lawyers and provided no meaningful class benefit. The district court approved the settlement and the Seventh Circuit reversed. As a class member, Frank had standing to challenge class certification and the approval of the settlement, even though reversal only unwound the attorneys' fees. As to the merits, the court found the class representative was not adequate. A settlement that results only in a benefit for class counsel and no meaningful relief for the class "is no better than a racket." The court found it was cynical to suggest the injunction – "a set of procedures designed to achieve better bread length uniformity" – provided value. The district court should have dismissed the case "out of hand."

- **Fourth Circuit Announces Standard For Pleading Facts Supporting Removal.**

  In Scott v. Cricket Communication, LLC, No. 16-2300 (4th Cir. July 28, 2017), plaintiff sued Cricket alleging breach of warranty and consumer fraud claims in connection with the sale of cellular telephones. Cricket invoked CAFA to remove the case to federal court. The district court remanded the case to state court, finding Cricket had not proved jurisdiction by a preponderance of the evidence. The Fourth Circuit reversed. The court stated that a removal petition must allege CAFA jurisdiction exists. If the plaintiff challenges removal, as here, the defendant bears the burden of demonstrating removal jurisdiction is proper by a preponderance of the evidence. If jurisdiction depends on contested claims of class member citizenship, as here, the removing defendant must do more than present "naked averments of citizenship." The district court erred in rejecting Cricket's evidence simply because it included Maryland residents, not all of whom are Maryland citizens. On remand, the district court was to consider all of the factors relevant to domicile and decide whether Cricket had presented enough facts to permit a court to determine by a preponderance of the evidence, not speculate, that it was more likely than not that jurisdiction existed.

- **Supreme Court: Despite American Pipe, Statute Of Repose Bars Opt Out Claims.**

  In *California Public Employees Retirement System v. ANZ Securities, Inc.*, No. 16373 (U.S. June 26, 2017), plaintiffs opted out of a class action and brought their own Securities Act claims more than three years after the challenged offering. The United States Supreme Court held that the three-year statute of repose for claims arising under the 1933 Securities Act prevented them from filing a lawsuit. The court held, by a 5-4 vote, that the *American Pipe* doctrine provides that a pending class action tolls statutes of limitations but does not toll statutes of repose. As a result, plaintiffs with 1933 Act claims who choose to opt out of a class action must do so and file their own actions within the three-year repose period. Unlike limitations periods, statutes of repose give explicit protection to defendants and enforce certainty. They are not subject to customary tolling rules or equitable exceptions. Four justices dissented, concluding instead that the timely initiation of a class action containing identical allegations was sufficient to preserve the right to sue.

- **Supreme Court: Parties Cannot Dismiss Case To Appeal Class Certification Denial.**

  In *Microsoft Corp. v. Baker*, No. 15-457, 2017 WL 2507341 (U.S. June 12, 2017), the United States Supreme Court held that appellate review does not exist for a voluntary dismissal with prejudice of individual plaintiffs' claims which purports to reserve the right to revive the dismissed claims should the court of appeals reverse the denial of class certification. In *Microsoft*, the district court denied class certification, and plaintiffs unsuccessfully sought Rule 23(f) permission to appeal. Rather than pursue their individual claims to judgment, plaintiffs stipulated to a voluntary dismissal of all claims with prejudice, but reserved the right to revive their claims should the court of appeals reverse the denial of certification. The United States Supreme Court held that the voluntary dismissal did not qualify as a final appealable order under Section 1291. In reaching this conclusion, the Court observed that the denial of class certification was not appealable as a collateral order, even where it provided a "death knell" to the litigation. The Court also noted that Rule 23(f) permitted discretionary appeals of class certification denials. With that background in mind, the Court concluded that only final orders resolving the entire controversy are appealable under Section 1291. Plaintiffs' "voluntary-dismissal tactic" violated these principles and invited protracted litigation and piecemeal appeals, the vices addressed in the final judgment rule. Three justices concurred in the result, but opined that the Court's conclusion was better grounded on Article III of the Constitution. In particular, the concurrence posits that there must be an actual controversy at all stages of review, and reversal of the class certification denial would not rightly revive any claims on the merits.

- **Ninth Circuit Rejects Post-Removal Amendment To Defeat Jurisdiction.**

  In <u>*Broadway Grill, Inc. v. Visa Inc.*</u>, No. 17-15499 (9th Cir. May 18, 2017), defendant successfully removed a class action to federal court, defeating plaintiffs' motion to remand. Plaintiffs then sought leave to amend the complaint to destroy diversity jurisdiction by limiting the class to the citizens of a single state. The district court granted leave to amend and remanded the case. The Ninth Circuit reversed. While the Ninth Circuit established in *Benko v. Quality Loan Service Corp*., 789 F.3d 1111 (9th Cir. 2015), that plaintiffs may amend their complaint upon removal to clarify the nature of their claims for purposes of determining jurisdiction, the court clarified in *Broadway Grill* that plaintiffs may not do so to eliminate minimal diversity and divest the federal courts of jurisdiction. The Ninth Circuit noted that its *Benko* decision led to uncertainty in the district courts as to when post-removal amendment was proper. It attempted to resolve that uncertainty by holding that whether remand is proper must be determined based on the pleadings at the time of removal. Thus, although *Benko* allows amendments to "clarify jurisdiction," attempts to amend a complaint after removal to eliminate jurisdiction "are doomed to failure." The court explained its holding was in accord with CAFA's purpose of expanding federal jurisdiction in class actions. One member of the panel dissented, concluding that the amendment fit within the parameters previously articulated in *Benko*.

- **Arbitration Clause In Law Firm Engagement Letter Did Not Support Class Arbitration.**

  An arbitration clause in a law firm's engagement letter was found not to support the client's attempt to pursue its breach of privacy claim as a class action. *Shore v. Johnson & Bell*, No. 16-CV-4363 (N.D. Ill. Feb. 22, 2017). The court found that the arbitration clause did not explicitly or implicitly agree to the use of class arbitration. The court noted that the engagement letter made clear that the agreement is between the law firm and a particular client or clients. The court found unpersuasive the client's argument that the use of form client engagement letters means that the law firm and other absent parties contracted and intended to engage in class arbitration.

- **Northern District Of California Requires Disclosure Of Litigation Funding In Class Actions.**

  On January 17, 2017, the United States District Court for the Northern District of California issued a revised standing order that defines the contents of joint case management statements in that district. The order requires disclosure of non-parties with interests in the litigation. In class actions, the standing order now requires the disclosure of litigation funders. It provides that "[i]n any proposed class, collective, or representative action, the required disclosure [of non-party interested entities] includes any person or entity that is funding the prosecution of any claims or counterclaim."

- **Ninth Circuit Reverses Approval Of Settlement Providing Injunctive Relief.**

  In *Koby v. Helmuth*, No. 13-56964 (9th Cir., Jan. 25, 2017), plaintiff claimed defendants' communications to collect debts violated the Fair Debt Collection Practices Act. The FDCPA permits recovery of actual loss or statutory damages up to $1,000, although class relief is capped at the lesser of $500,000 or 1% of the defendant's net worth. The magistrate approved a class settlement in which the named plaintiffs each received $1000, class counsel received fees of $67,500, there was a $35,000 *cy pres* award (equal to 1% of the defendant's net worth) paid to a San Diego charity, and the remaining 4 million class members received injunctive relief and released damages claims against defendant in any other class action. The Ninth Circuit reversed the settlement approval as an abuse of discretion, finding there was no evidence that the settlement provided any value to the class members. In particular, the injunctive relief was" worthless" to the class because it pertained to those who would be contacted in the future, whereas the class consisted of those individuals contacted in the past. There was no evidence the two groups were the same. Separately, the court found that the magistrate had authority to enter a class action settlement even though the absent class member did not expressly consent to appear before a magistrate. However, because the court rejected the settlement, the court did not address the question of whether adjudication by a magistrate violated due process.

- **Eighth Circuit Reverses Target Data Breach Settlement And Bond Requirement.**

  In *In re Target Corporation Customer Data Security Breach Litigation*, No. 15-3909 (8th Cir. Feb. 1, 2017), the Eighth Circuit evaluated the district court's approval of the settlement of claims arising out of a breach of Target's payment card data and personal information system. Under the settlement, Target created a $10 million fund for the class. Class members with documented losses were to be compensated from the fund first, with the remaining balance to be distributed among class members with undocumented losses. Class members who suffered no losses were to receive nothing. The district court approved the settlement over the objection of a class member who had yet to suffer a loss from the breach, who argued that he was not represented by the named plaintiffs because all of them claimed an existing loss. The district court further imposed a nearly $50,000 bond to permit the objector's appeal. The Eight Circuit reversed, finding that the class representatives were not adequate on the record in the district court. The class representatives' interests differed from those members of the class who had not yet suffered a loss. Because of this conflict, the representatives were unable to assert the interests of class members such as the objector. The Eighth Circuit also reversed as to the appeal bond imposed by the district court. Only $2,200 of the bond secured the costs of the judgment. The district court imposed the remaining $47,000 to cover "the financial harm the class will suffer" due to the delay of an appeal. The Eighth Circuit held, however, that costs associated with delays in administering a class action settlement are not an appropriate subject of a bond. Instead, the court ordered that the bond be reduced to reflect only those costs the appellees could recover should they succeed on remand following appeal.

- **Seventh Circuit Establishes Brightline Tolling Rule.**

  In *Collins v. Village of Palatine, Illinois*, No. 16-3395 (7th Cir. Nov. 16, 2017), the Seventh Circuit addressed the intricacies of the American Pipe doctrine. That case provides that when plaintiff files a complaint on behalf of a class, the statute of limitations for each member of the class is tolled until "the case is 'stripped of its character as a class action.'" This "stripping" occurs when the district court denies class certification, dismisses the case for lack of subject matter jurisdiction, or otherwise dismisses the case without prejudice. In *Collins*, the Seventh Circuit held that a dismissal with prejudice also strips the case of its class action character. The court adopted a "simple and uniform rule: Tolling stops immediately when a class action suit is dismissed – with or without prejudice – before the class is certified." The Court considered whether a district court's dismissal of a prior lawsuit tolled the limitations period, or whether tolling continued until the dismissal was affirmed and certiorari denied. The Seventh Circuit found the statute of limitations was not tolled during the period from the district court's dismissal until the Supreme Court denied certiorari. The Court relied on cases in other contexts that established the consensus view that "once certification is denied, the limitations clock *immediately* starts ticking again." In *Collins*, the Seventh Circuit applied that reasoning to the dismissal with prejudice of the underlying claim, even if certification had not yet been sought or obtained.

- **Eighth Circuit Addresses Standing For Data Breach Claim.**

  In *In re SuperValu, Inc., Customer Data Security Breach Litigation*, No. 16-2378 (8th Cir. Aug. 30, 2017), the Eighth Circuit reviewed the district court's dismissal of a lawsuit alleging claims arising out of a data breach that purportedly caused a single identified unauthorized charge. The district court found plaintiffs lacked standing because they did not suffer an injury in fact. As for the risk of future injury, the Eighth Circuit concluded plaintiffs had alleged information had been stolen, but, with one exception, had not alleged that it had been misused. The Court found the mere possibility of future harm was not sufficient for standing. Likewise, the costs plaintiffs may incur to mitigate their risk of future harm cannot create an injury where the risk of future identify theft is itself speculative. As for present injury, the Court concluded that the single allegation of misuse of credit card information was sufficient to demonstrate the class representative had standing. Because one named plaintiff had standing, the district court erred in dismissing the action.

- **Arbitration Clause In "In Box Warranty" Insufficient To Bind Consumer To Arbitrate.**

  The Ninth Circuit held that an arbitration provision contained in a warranty brochure that was included in a cell phone box was not binding on a class of consumer plaintiffs complaining about the phone's performance. *Norcia v. Samsung Telecommunications America, LLC*, No. 14-16994 (9th Cir. Jan. 19, 2017). Applying California law, the court rejected defendant's argument that inclusion of the arbitration provision in the brochure created a valid contract with the purchasers to arbitrate all claims relating to the phone. The court noted that the consumers did not expressly assent to any agreement in the brochure. Nor did the consumers otherwise act in a manner that would show that they accepted the arbitration agreement. Moreover, the outside of the box did not notify the consumers that opening the box would be considered agreement to the terms set forth in the brochure included inside. Accordingly, the court rejected defendant's contention that the consumers had assented to the arbitration provision, and it concluded that the consumers could not be compelled to arbitrate their claims.

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- **Ninth Circuit Rejects Heightened Ascertainability Standard.**

  In *Briseno v. ConAgra Foods, Inc.*, No. 15-55727 (9th Cir. Jan. 3, 2017), the Ninth Circuit joined the Sixth, Seventh and Eighth Circuits in splitting from the Third Circuit and declining to adopt the requirement that plaintiffs proffer an administratively feasible way to identify members of certified classes. The Ninth Circuit case arose out of a class action alleging that consumers were misled into purchasing a "100% natural" product during the class period despite the fact the product contained certain ingredients plaintiffs contend are not natural. Following the decision of the Seventh Circuit in *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015) (*see* July 2015 *EWS: Litigation Update*), and other courts, the court rejected the requirement that plaintiffs identify purchasers of the affected product and concluded that the language of Rule 23 neither provides nor implies that demonstrating an administratively feasible way to identify class members is a prerequisite to certification and the policy justifications for such rule are already addressed in Rule 23.

- **CAFA Does Not Permit Removal By Additional Counterclaim Defendant.**

  In *First Bank v. DJL Properties, LLC*, 598 F.3d 915 (7th Cir. 2010), the United States Court of Appeals for the Seventh Circuit held that a counterclaim defendant may not remove a case to federal court under CAFA. In *Tri-State Water Treatment, Inc. v. Bauer*, No. 16-3938 (7th Cir. Jan. 5, 2017), the Seventh Circuit decided the related question of whether an additional counterclaim defendant may remove a case, even though the original counterclaim-defendant is barred from doing so. The Seventh Circuit held that CAFA does not permit treating an original counterclaim defendant differently from a new one and therefore neither party may remove a claim to federal court based on CAFA jurisdiction over a counterclaim. The *Tri-State* case started as a collection action in state court. Defendants counterclaimed against Tri-State asserting a multi-state class action for fraud in connection with the sale of the underlying product. The defendant filed an amended counterclaim in which it added an additional party. The newly added party sought to remove the case under CAFA. The amount in controversy exceeded CAFA's jurisdictional minimum and the counterclaim arose under Rule 23. The district court remanded the case to state court, and the Seventh Circuit agreed to hear the appeal. Engaging in a textual analysis of CAFA, the Seventh Circuit concluded that the newly added counterclaim defendant, like any defendant to the counterclaim, lacks authority to remove.

- **FACTA Claim Insufficient to Survive Spokeo.**

  In *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016), the United States Supreme Court held Article III standing required injury in fact, defined as the invasion of "a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id., citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Seventh Circuit recently applied this standard to a claim brought under FACTA, a federal statute that prohibits disclosure of certain personal information on credit card receipts. The plaintiff in the Seventh Circuit case alleged that the defendant had violated FACTA by failing to truncate the credit card expiration date on the credit card receipt, as FACTA requires. Applying *Spokeo*, the Seventh Circuit held plaintiff lacked constitutional standing. The statutory violation, in the form of the failure to truncate the credit card expiration date, was insufficient to confer standing. There needed to be a showing of injury, and there was none. *Meyers v. Nicolet Restaurant of De Pere, LLC*, No. 16-2075 (7th Cir. Dec. 13, 2016). The Court discussed similar decisions from other circuits and noted that a plaintiff may be able to show harm from a violation of FACTA where that violation caused concrete harm. Plaintiff may seek statutory damages even if the actual damages caused by the violation are "small or difficult to ascertain." In Meyers, however, the plaintiff had alleged "no concrete harm or risk of harm," and therefore he lacked standing and could not avail himself of the statute's statutory damages remedy.

- **CA: Who Decides Class Arbitration Issues Depends On The Parties' Contract.**

  In Sandquist v. Lebo Automotive, Inc., No. S220812 (July 28, 2016), a divided California Supreme Court concluded that "no universal rule" controls whether it is a court or the arbitrator that decides if an arbitration agreement permits or prohibits class-wide arbitration; instead who decides that issue is a matter of the parties' agreement, subject to interpretation under state contract law. The majority found that, just as whether class arbitration is available depends on whether the parties agreed to allow or forbid it, so too the question who has the power to decide the availability of class arbitration turns upon what the parties agreed about the allocation of that power. Further, the majority held that the examination must be conducted through the prism of state law. Here, the court concluded that the parties' arbitration agreement allocated that decision to the arbitrator. Under federal arbitration law, no contrary presumption requires a different result, so the issue remained one for the arbitrator. The dissent noted that every federal court of appeals to consider the issue has concluded to the contrary, that is, whether an arbitration agreement permits class arbitration is presumptively a question for the court, rather than the arbitrator, because it is a gateway question of arbitrability for purposes of the Federal Arbitration Act.

- **Seventh Circuit Rejects Disclosures As Basis For Settlement Or Attorneys' Fee Award.**

  Plaintiffs frequently file purported class actions on behalf of shareholders challenging the accuracy of merger disclosures. Such cases often end with a quick settlement under which class counsel receive fees and the shareholders receive additional disclosures regarding the proposed merger transaction, which then proceeds to close. In In re Walgreen Co. Stockholder Litigation, No. 15-3799 (7th Cir. Aug. 10, 2016), the Seventh Circuit was sharply critical of such lawsuits and their settlements. The Seventh Circuit reversed the approval of the settlement, finding the curative disclosures provided no real value to the class and were therefore insufficient to justify settling a claim or the award of fees. The Seventh Circuit adopted the standard the Delaware Chancery Court adopted in *In re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884, 894 (Del. Ch. 2016), for approving such settlements. In *Trulia*, the Delaware court indicated that disclosure settlements are likely to be met with continued disfavor "unless the supplemental disclosures address a plainly material misrepresentation or omission." In the *Walgreen* case, the Seventh Circuit found the supplemental disclosure did nothing for the shareholders.

- **Eighth Circuit Permits Lodestar Calculation Of Attorneys' Fees For Coupon Relief.**

  In *In re HP Inkjet Printer Litigation*, 716 F.3d 1173, 1181-83 (9th Cir. 2013), the Ninth Circuit held that a district court must calculate attorneys' fees for coupon awards as a percentage of the redeemed coupon value and must use the lodestar method to calculate fees for injunctive relief. In *In re Southwest Airlines Voucher Litigation*, 799 F.3d 701, 707 (7th Cir. 2015), the Seventh Circuit disagreed and held that the district court may use the lodestar method to calculate attorneys' fees in a coupon case. We have previously reported on these cases. (See May 2013, October 2014 and August 2015 EWS: Litigation Updates.) In Galloway v. Kansas City Landsmen, LLC, No. 15-1629 (8th Cir. Aug. 19, 2016), the Eighth Circuit agreed with the Seventh Circuit. In a class action, even where relief is provided by coupon, the district court may award fees based on the lodestar method as long as the fees sought are reasonable. On the facts of the case, the court of appeals found that the district court's reduction of the claimed fees to reflect the limited value of the class action was reasonable.

- **California Permits Percentage Of Common Fund Fee Award.**

  In Laffitte v. Robert Half Int'l, Inc., No. S222996 (Cal. Aug. 11, 2016), the Supreme Court of California clarified the law of California, and held that when an attorneys' fee is awarded out of a common fund preserved or recovered through litigation, that fee may be calculated as a percentage of the common fund. In those circumstances, the trial court also may use the lodestar-multiplier method as a cross-check for the selected percentage.

- **Trial Court Authorizes Disclosure Of Litigation Funding Agreement To Test Adequacy.**

  In Gbarabe v. Chevron Corp., No. 14-CV-00173-SI (N.D. Cal. Aug. 5, 2016), plaintiffs sued Chevron for injuries resulting from a natural gas drilling accident that occurred off the coast of Nigeria. Chevron requested that plaintiff produce documents reflecting the financing or funding of the litigation, contending that the funding agreement was relevant to determining the adequacy of the proposed class representative. The trial court agreed. Notwithstanding the confidentiality provision of the funding agreement, production was needed to permit Chevron to assess the funding agreement and any impact it would have on the adequacy of the plaintiff to serve as a class representative.

- **Class Rep/Counsel Conflicted By Representing Monetary And Injunctive Settlement Classes.**

  In *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, No. 12-4671 (2d Cir. June 30, 2016), a plaintiff class consisting of 12 million merchants claimed VISA and MasterCard had violated the antitrust laws. After extensive litigation, the parties agreed to a complex settlement, which the trial court approved. A class of merchants who participated in the program from 2004 through November 28, 2012 was certified under Rule 23(b)(3); they would share in a $7.25 billion settlement pool. A second class of merchants who participated in programs after November 28, 2012 was certified under Rule 23(b)(2); those merchants would not share in the monetary relief. Rather, they would benefit solely from certain program changes made a part of a final injunction. The Second Circuit reversed the approval of the settlement. First, the court found the class representatives were inadequate because they had interests antagonistic to some of the class members they purported to represent. The same counsel represented both classes even though the conflict was evident between merchants pursuing only monetary relief and merchants who received only injunctive relief. The class thus "manifest[ed] tension on 'an essential allocation decision.'" Class counsel and class representatives were in a position to trade benefits for one class for benefits to the other. Moreover, class counsel stood to gain enormously from the deal as the district court had granted counsel over $544 million in fees, which were calculated based solely on the monetary relief. In fact, class counsel did not even ask to be compensated based on the injunctive relief. The court explained "[p]roblems arise when (b)(2) and (b)(3) classes do not have independent counsel, seek distinct relief, have non-overlapping membership, and (importantly) are certified as settlement only." Second, the court's suspicions about the deal were confirmed by the substance of the settlement: the court rejected the settlement because portions of the class were bound to the release without receiving any meaningful value.

- **District Court May Decertify A Class Post-Trial Taking Jury Fact Findings Into Account.**

  In Mazzei v. Money Store, No. 15-2054 (2d Cir. July 15, 2016), plaintiff alleged defendants had assessed improper late fees on mortgages. The district court certified a class of borrowers whose loans were owned or serviced by defendant. The case went to trial and plaintiffs were awarded $32 million plus prejudgment interest. Post-judgment, defendant moved to decertify the class due to plaintiff's failure to prove classwide privity of contract between the defendant and those class members whose loans it serviced but did not own. The district court agreed that plaintiff had failed to prove privity with respect to those absent class members, which defeated class certification on grounds of typicality and predominance and decertified the class. The Second Circuit affirmed. It held a district court may decertify a class post-verdict without running afoul of the Seventh Amendment. The class's right to adjudication by jury was unimpaired as their individual claims survive by virtue of American Pipe tolling; any member of the decertified class who wished to file a lawsuit was free to do so. The court held, however, that in deciding whether to decertify post-trial, the district court must credit the jury's factual findings. While the district court generally resolves factual issues related to class certification based on its own evaluation of the preponderance of the evidence, the district court must defer to any factual findings the jury necessarily made unless those findings were "'seriously erroneous,' a 'miscarriage of justice,' or 'egregious,'" which is the same standard to be used on a Rule 59 motion. Here, the district court found, contrary to the jury's factual finding, that privity was lacking. The Second Circuit concluded the district court did not abuse its discretion in making that determination and, in the absence of privity between defendant and those borrowers whose loans were simply serviced by defendant, the district court's decertification of the class was not an abuse of discretion.

- **Class Action Waiver In Employment Arbitration Agreement Violated Federal Labor Law.**

  The Seventh Circuit held that a class action waiver in an employment agreement that prohibited collective arbitration or collective action in any other forum violated the National Labor Relations Act (NLRA) and was unenforceable under the Federal Arbitration Act (FAA). Lewis v. Epic Systems Corp., No. 15-2997 (7th Cir. May 26, 2016). The court found that the class action waiver in the arbitration clause impinged on employees' rights to seek collective remedies in wage-and-hour disputes in violation of the NLRA. The court then rejected the employer's argument that the FAA's arbitration enforcement provisions should prevail over the NLRA's provisions. The court noted that the FAA provides for enforcement of arbitration clauses "save upon such grounds as exist at law or in equity for the revocation of any contract." Because the provision at issue was unlawful under the NLRA, it met the criteria of the FAA's saving clause for non-enforcement. The court noted that the Fifth Circuit had reached the opposition conclusion on this issue, creating a circuit split.

- **Sealed Trial Documents Result In Reversal Of Class Action Settlement.**

  In *Shane Grp. Inc. v. Blue Cross Blue Shield of Michigan*, No. 15-1551 (6th Cir. June 7, 2016), plaintiffs brought a price-fixing antitrust class action against a health insurer. In the course of the litigation, the district court sealed most of the substantive filings from public view, including exhibits and an expert report on which the parties later based the ultimate settlement in the case. The district court preliminarily approved the settlement and authorized notice to the class. Class members who objected to the settlement were unable to review the sealed documents. One group of objectors sought to intervene so that they could review the sealed materials. The district court denied the motion to intervene and approved the settlement. The Sixth Circuit reversed, finding the district court abused its discretion when it sealed documents in the litigation. It found the district court's order upholding the sealing were "brief, perfunctory, and patently inadequate," and failed to meet the requirements for a protective order under Rule 26, let alone the obligations for sealing court documents. The Sixth Circuit explained that the error was the most acute in connection with sealing plaintiffs' expert's report. Review of that report was necessary before the court and the objectors could assess the reasonableness of the settlement. On remand, the district court was to review the settlement in light of the value of the claims given up, shown in large part by the expert report. The court also questioned the fee award and the incentive awards to class representatives.

- **Long-Term Release Of Pollutants Did Not Satisfy "Single Event" CAFA Exception.**

  In Allen v. The Boeing Co., No. 15-35162 (9th Cir. Apr. 6, 2016), a large group of plaintiffs alleged property damage resulting from groundwater contamination near a Boeing plant. Boeing removed the actions to federal court based on the mass action provision of CAFA. The district court remanded, finding the lawsuit fell within the "local single event exception" to CAFA jurisdiction. That exception precludes removal of mass actions in which all of the claims arise from a single event in the state in which the action was filed. The Ninth Circuit reversed. Following a prior Ninth Circuit decision which emphasized the need for a "local single event," the panel concluded the complaint alleged multiple events over a long time period and therefore the exception to jurisdiction did not apply. The court noted the Fifth Circuit held that where there are a number of related negligent acts over a period of time, which culminate in a single event, that also falls within the exception. Although the Ninth Circuit disagreed, it found that plaintiffs had challenged many distinct actions over an extended time period. Thus, although the courts' legal rulings differ, the outcome would have been the same under the Fifth Circuit's test. The court remanded for further consideration of the local controversy exception, another provision within CAFA.

- **Supreme Court Remands Case To Consider Injury In Fact Requirement.**

  Spokeo, Inc. v. Robins, No. 13-1339 (U.S. May 16, 2016), involves the Fair Credit Reporting Act, which creates a private remedy for violation of its provisions. Notwithstanding Congress's authorization of a remedy, defendant argued the plaintiff lacked standing to maintain an action because the technical violation of the FCRA did not harm plaintiff. The Ninth Circuit found there was standing as defendant may have affected plaintiff's personal interest in the handling of his credit information, in the violation of plaintiff's statutory rights. The Supreme Court held the Ninth Circuit's analysis was incomplete. Injury in fact requires that the injury that is "particularized" and "concrete." The alleged injury in this case was particularized, as it was alleged to "affect the plaintiff in a personal and individual way." The injury must also be "concrete." A concrete injury must be "de facto; that is, [it must] actually exist." Concrete injuries are real, not abstract. While Congress may identify and create remedies for intangible harms, the injury in fact requirement is not satisfied whenever a statute grants a statutory right and authorizes a plaintiff to sue. Rather, Article III requires a concrete injury even in the context of a statutory violation. Applying these principles, the Court held Congress sought to prevent the dissemination of false information by adopting procedures designed to decrease that risk. Still, a plaintiff cannot satisfy Article III by alleging a procedural violation where that procedural violation results in no harm. The Ninth Circuit overlooked the requirement of concrete injury. The Supreme Court remanded for consideration of this injury in fact requirement.

- **CAFA Removal Provision Trumps Federal Rules.**

  A plaintiff may remove a state case to federal court by filing a notice of removal within 30 days after receipt of the initial pleading. CAFA contains a second removal provision, which permits removal "within 30 days after receipt by the defendant" of a pleading "or other paper from which it may first be ascertained that the case is one which is or has become removable." In Graiser v. Visionworks of America, Inc., No. 16-3167 (6th Cir. Apr. 6, 2016), plaintiff brought a consumer fraud claim. Defendant removed the case unsuccessfully. On remand, plaintiff amended the complaint to seek class relief. Six months later, defendant removed the case a second time. The district court found the second removal untimely. The Sixth Circuit reversed. Focusing on the CAFA removal provision, the Sixth Circuit held that information establishing the basis for removal must come from a source outside of defendant's control. Thus, even though it could be argued that defendant knew the case presented a sufficient amount in controversy to justify CAFA removal, the date triggering CAFA removability is the date the defendant receives information from the plaintiff asserting that fact. Any other rule would involve guesswork and ambiguity. Agreeing with other circuits to have addressed the issue, the court ruled that CAFA's removal provision contains a bright-line rule that limits inquiry to information provided to the defendant by the plaintiff. Applying this standard, the 30-day window never began to run because plaintiffs had not provided the required notification. The court further held that even if the case was originally removable under general removal provisions and that time had lapsed, defendant could still remove the action under CAFA. The expiration of the other 30-day requirement did not eliminate defendant's removal rights under CAFA.

- **TCPA Class Upheld Even Though Representative Outside Of Class's Geographic Zone.**

  In Bridgeview Health Care Center, Ltd. v. Clark, Nos. 14-3728, 15-1793 (7th Cir. Mar. 21, 2016), plaintiffs brought an action for violation of the TCPA. Defendant Clark had authorized a vendor to send 100 faxes to local businesses within a 20-mile radius. In fact, the vendor sent nearly 5,000 faxes to businesses in a four state region. The defendant was only liable for those faxes sent "on its behalf." The court concluded Clark had not authorized the vendor to send faxes outside the 20-mile zone. Thus, the claim was properly limited to those faxes sent within that area. Clark argued the district court should have created a subclass of plaintiffs within the 20-mile zone, and inasmuch as the named plaintiff was from outside that zone and, it could not adequately represent the 24 businesses who received the 32 faxes sent within the 20 mile radius. The Seventh Circuit rejected this argument. Despite not being entitled to recover, the named plaintiff was not distracted from its representation by advocating arguments unique to it. Instead, plaintiff was in the same position as the majority of fax recipients and the fact that it did not ultimately recover did not prevent the district court from finding it adequately represented plaintiffs who did. The court declined to decertify, holding decertification would not affect Clark's liability to any plaintiff, and the judgment was appropriately limited to recipients within the 20-mile zone.

- **U.S. Supreme Court Upholds Certification Based Upon Representative Proof.**

  In Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146 (U.S. March 22, 2016), the United States Supreme Court upheld a class verdict despite the claim that certification was improper. Tyson argued that the district court should not have certified a class because members of the putative class incurred different damages and some might not have been damaged at all. In *Tyson*, employees alleged they should have received overtime pay for the time they spent "donning and doffing" their protective gear. The district court ruled for plaintiffs, and calculated a remedy based on an analysis of the time spent by sampled employees. The employer asserted that the amount of time actually spent donning and doffing varied among the class members, and thus "person-specific inquiries into individual work time" predominated over common questions. The Supreme Court rejected that argument and affirmed, recognizing that a representative sample may be the only practicable way to prove such a case. The Court acknowledged that although it would be improper to rely on a representative sample in a class case if such a sample could not be used to prove an individual case; in such an instance, the class action device would violate the Rules Enabling Act's instruction that the use of a class device cannot abridge "any substantive right." The Supreme Court held, however, that it was permissible to prove a case based upon representative employees, particularly where the employer violate its duty to keep records and the employees had no other way to establish their claims. The Supreme Court clarified that it had not held in *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011) that a sample is impermissible to establish classwide liability. Instead, it held only that the sample in that case was insufficient because the *Walmart* plaintiffs were not similarly situated. It also distinguished *Walmart*, observing that unlike in *Tyson*, had the *Walmart* employees brought individual suits, there would have been no role for representative evidence.

- **Seventh Circuit Rejects Application Of "One-Way Intervention Defense" To Class Certification.**

  In *Costello v. BeavEx, Inc.*, No. 15-1109 (7th Cir. Jan. 19, 2016), plaintiff asserted that defendant violated the labor laws by treating employees as independent contractors. Defendant argued class certification was barred by the rule against one-way intervention, which prevents plaintiffs from moving for class certification after obtaining a favorable ruling on the merits. The rule exists to avoid the unfairness of allowing class members to benefit from a favorable judgment without subjecting themselves to the effect of an unfavorable one. If an individual plaintiff were to obtain a favorable ruling on the merits, and then certification, class members would remain in the lawsuit to benefit from that ruling. If the individual plaintiff received an unfavorable ruling on the merits prior to certification, class members could opt out to avoid that ruling. Allowing class members to decide whether to be bound with knowledge of the merits ruling is unfair to the defendant. The court found this defense, largely based on Seventh Circuit decisions dating back to the 1970s, was inapplicable. While the plaintiff moved for partial summary judgment and class certification contemporaneously, the district court first denied class certification, then granted partial summary judgment in the same order. Reaching the merits of class certification, the court found the district court erred in finding predominance could not be decided based on common questions.

- **Class Certification Rejected As Deposition Revealed Representative Was Inadequate.**

  Federal Rule 23(a)(4) and state law equivalents require the class representative to be "adequate," a requirement most class representatives satisfy. Where a class representative or counsel is rejected, it is typically due to the existence of a conflict. *Byer Clinic & Chiropractic, Ltd. v. Kapraun*, No. 1-14-3733, 2016 IL App. 143733 (Ill. App. Ct. Jan. 19, 2016), presents the unusual situation where a court denied class certification because the representative was inadequate. The deposition of the representative revealed the plaintiff had no grasp of the duties of a class representative, negligible knowledge of the case, virtually no interest in the case, and no knowledge of the attorneys fee relationship. While the court held that the duties of a class plaintiff are often minimal and the trial court is afforded discretion in determining adequacy, the deposition testimony revealed the plaintiff to be "uninformed, lackadaisical, and inattentive about the facts, the litigation, and his role as the class representative." As a result, the representative was precisely the type of plaintiff "a court wants to detect and avoid."

- **"Effective Vindication" Exception Invalidates Arbitration Clause.**

  The Tenth Circuit allowed a plaintiff representing a putative class action of students to defeat a motion to compel arbitration under the judicially-recognized "effective vindication" exception to the Federal Arbitration Act ("FAA"). *Nesbitt v. FCNH, Inc.*, No. 14-1502 (10th Cir. Jan. 5, 2016). Plaintiffs alleged that their massage therapy school violated the Fair Labor Standards Act by requiring the students to provide massage therapy services to clients without pay. The school moved to compel arbitration, citing the arbitration clause in the students' enrollment agreement. Denying the school's motion to compel arbitration, the district court concluded, and the Tenth Circuit affirmed, that the prospect of having to pay arbitrators' fees rendered the students unable to effectively vindicate their statutory rights and therefore invalidated the arbitration clause. The fact that the students could have opted out of the arbitration clause at the time of their enrollment did not preclude them from invoking the effective vindication exception to the FAA.

- **Supreme Court Rejects Class Action "Pick Off" Defense.**

  Answering a question left open in *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), the Supreme Court held that, in accord with Federal Rule of Civil Procedure 68, an unaccepted settlement offer has no force and creates no lasting right or obligation. With a settlement "offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists" such that the unaccepted offer to satisfy the named plaintiffs' individual claim does not render a class action case moot. *Campbell-Ewald Co. v. Gomez*, No. 14-857 (S. Ct. Jan. 20, 2016). In this TCPA class action, defendant made a Rule 68 offer of judgment to the named plaintiff prior to the court certifying the class. Arguably, the offer of judgment constituted full satisfaction of the class representative's individual claim. Plaintiff did not accept the settlement offer which, under Rule 68, lapsed. Defendant then moved to dismiss the case, arguing there was no Article III case or controversy because the individual offer provided complete relief, mooting the case. The Supreme Court adopted the reasoning of Justice Kagan's dissenting opinion in *Genesis HealthCare*, and held that an unaccepted settlement offer, like any unaccepted contract offer, has no operative effect. Under basic principles of contract law, and the text of Rule 68, a case or controversy remains. Justice Thomas concurred, reaching the same conclusion based on his view of the common law history of "tenders."

NOTES

9

Certiorari to the United States Court of Appeals for the Ninth Circuit, *In re: China Agritech, Inc. v. Resh*, No. 17-342 (U.S. 2018)

Submitted by:
Sharon Robertson
Cohen Milstein Sellers & Toll PLLC

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CHINA AGRITECH, INC. *v.* RESH ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17–432. Argued March 26, 2018—Decided June 11, 2018

American Pipe & Constr. Co. v. *Utah*, 414 U. S. 538, established that the timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint and that members of a class that fails to gain certification can timely intervene as individual plaintiffs in the still-pending action, shorn of its class character. *American Pipe*'s tolling rule also applies to putative class members who, after denial of class certification, "prefer to bring an individual suit rather than intervene." *Crown, Cork & Seal Co.* v. *Parker*, 462 U. S. 345, 350. The question presented in this case is whether *American Pipe* tolling applies not only to individual claims, but to successive class actions as well.

This suit is the third class action brought on behalf of purchasers of petitioner China Agritech's common stock, alleging materially identical violations of the Securities Exchange Act of 1934. The Act has both a two-year statute of limitations and a five-year statute of repose, 28 U. S. C. §1658(b). Here, the accrual date for purposes of the Act's limitation period is February 3, 2011, and for the repose period, November 12, 2009. Theodore Dean, a China Agritech shareholder, filed the first class-action complaint on February 11, 2011. As required by the Private Securities Litigation Reform Act of 1995 (PSLRA), his counsel posted notice of the action and invited any member of the purported class to move to serve as lead plaintiff. Six shareholders sought lead-plaintiff status. On May 3, 2012, the District Court denied class certification; the action settled in September 2012, and the suit was dismissed. On October 4, Dean's counsel filed a new complaint (*Smyth*), still timely, with a new set of plaintiffs. Eight shareholders sought lead-plaintiff appointment in response to the PSLRA notice, but the District Court again denied class certification. Thereafter, the *Smyth* plaintiffs settled their individual claims and dismissed their suit.

Respondent Michael Resh, who did not seek lead-plaintiff status in the earlier actions, filed the present class action in 2014, a year and a half after the statute of limitations expired. The other respondents moved to intervene in the suit commenced by Resh, seeking lead-plaintiff status. The District Court dismissed the class complaint as untimely, holding that the *Dean* and *Smyth* actions did not toll the time to initiate class claims. The Ninth Circuit reversed, holding that the reasoning of *American Pipe* extends to successive class claims.

Held: Upon denial of class certification, a putative class member may not, in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations. Pp. 5–15.

(a) *American Pipe* and *Crown, Cork* addressed only putative class members who wish to sue individually after a class-certification denial. The "efficiency and economy of litigation" that support tolling of individual claims, *American Pipe*, 414 U. S., at 553, do not support maintenance of untimely successive class actions such as the one brought by Resh. Economy of litigation favors delaying individual claims until after a class-certification denial. With class claims, on the other hand, efficiency favors early assertion of competing class representative claims. If class treatment is appropriate, and all would-be representatives have come forward, the district court can select the best plaintiff with knowledge of the full array of potential class representatives and class counsel. And if the class mechanism is not a viable option, the decision denying certification will be made at the outset of the case, litigated once for all would-be class representatives.

Federal Rule of Procedure 23 evinces a preference for preclusion of untimely successive class actions by instructing that class certification should be resolved early on. The PSLRA, which governs this litigation, evinces a similar preference, this time embodied in legislation providing for early notice and lead-plaintiff procedures. There is little reason to allow plaintiffs who passed up opportunities to participate in the first (and second) round of class litigation to enter the fray several years after class proceedings first commenced.

Class representatives who commence suit after expiration of the limitation period are unlikely to qualify as diligent in asserting claims and pursuing relief. See, *e.g., McQuiggin* v. *Perkins*, 569 U. S. 383, 391. And respondents' proposed reading would allow extension of the statute of limitations time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation. Endless tolling of a statute of limitations is not a result envisioned by *American Pipe*. Pp. 5–11.

(b) If Resh's suit meets the requirements of Rule 23(a) and (b), respondents assert, the suit should be permitted to proceed as a class action in keeping with *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393. *Shady Grove*, however, addressed a case in which a Rule 23 class action could have been maintained absent a state law proscribing class actions, while Resh's class action would be untimely unless saved by *American Pipe*'s tolling exception. Rule 23 itself does not address timeliness of claims or tolling and nothing in the Rule calls for the revival of class claims if individual claims are tolled.

The clarification of *American Pipe*'s reach does not run afoul of the Rules Enabling Act by abridging or modifying a substantive right. Plaintiffs have no substantive right to bring claims outside the statute of limitations. Nor is the clarification likely to cause a substantial increase in the number of protective class-action filings. Several Courts of Appeals have already declined to read *American Pipe* to permit a successive class action filed outside the limitations period, and there is no showing that these Circuits have experienced a disproportionate number of duplicative, protective class-action filings. Multiple filings, moreover, could aid a district court in determining, early on, whether class treatment is warranted, and if so, who would be the best representative. The Federal Rules provide a range of mechanisms to aid district courts in overseeing complex litigation, but they offer no reason to permit plaintiffs to exhume failed class actions by filing new, untimely class claims. Pp. 11–15.

857 F. 3d 994, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, BREYER, ALITO, KAGAN, and GORSUCH, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in the judgment.

SUPREME COURT OF THE UNITED STATES

No. 17–432

CHINA AGRITECH, INC., PETITIONER *v.* MICHAEL H. RESH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 11, 2018]

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the tolling rule first stated in *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538 (1974). The Court held in *American Pipe* that the timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint. Where class-action status has been denied, the Court further ruled, members of the failed class could timely intervene as individual plaintiffs in the still-pending action, shorn of its class character. See *id.,* at 544, 552–553. Later, in *Crown, Cork & Seal Co.* v. *Parker*, 462 U. S. 345 (1983), the Court clarified *American Pipe*'s tolling rule: The rule is not dependent on intervening in or joining an existing suit; it applies as well to putative class members who, after denial of class certification, "prefer to bring an individual suit rather than intervene . . . once the economies of a class action [are] no longer available." 462 U. S., at 350, 353–354; see *California Public Employees' Retirement System* v. *ANZ Securities, Inc.*, 582 U. S. ___, ___ (2017) (slip op., at 13) (*American Pipe* "permitt[ed] a class action to splinter into individual suits"); *Smith* v. *Bayer Corp.*, 564 U. S. 299, 313–314, n. 10 (2011) (under *American Pipe* tolling rule, "a putative member of an uncertified class may wait until after the court rules on the certification motion to file an individual claim or move to intervene in the [existing] suit").

The question presented in the case now before us: Upon denial of class certification, may a putative class member, in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations? Our answer is no. *American Pipe* tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action individually or file individual claims if the class fails. But *American Pipe* does not permit the maintenance of a follow-on class action past expiration of the statute of limitations.

I

The instant suit is the third class action brought on behalf of purchasers of petitioner China Agritech's common stock, alleging violations of the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U. S. C. §78a *et seq*. In short, the successive complaints each make materially identical allegations that China Agritech engaged in fraud and misleading business practices, causing the company's stock price to plummet when several reports brought the misconduct to light. See App. 60–100 (*Resh* complaint), 205–235 (*Smyth* complaint), 133–156 (*Dean* complaint). The Exchange Act has a two-year statute of limitations that begins to run upon discovery of the facts constituting the violation. 28 U. S. C. §1658(b). The Act also has a five-year statute of repose. *Ibid.*[1] The

[1] A statute of limitations "begin[s] to run when the cause of action accrues—that is, when the plaintiff can file suit and obtain relief." *California Public Employees' Retirement System* v. *ANZ Securities, Inc.*,

parties agree that the accrual date for purposes of the two-year limitation period is February 3, 2011, and for the five-year repose period, November 12, 2009. Brief for Respondents 8, n. 3.

Theodore Dean, a China Agritech shareholder, filed the first class-action complaint on February 11, 2011, at the start of the two-year limitation period. As required by the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737, Dean's counsel posted notice of the action in two "widely circulated national business-oriented publication[s]," 15 U. S. C. §78u–4(a)(3)(A)(i), and invited any member of the purported class to move to serve as lead plaintiff. App. 274–280. Six shareholders responded to the notice, seeking to be named lead plaintiffs; other shareholders who had filed their own class complaints dismissed them in view of the *Dean* action. On May 3, 2012, after several months of discovery and deferral of a lead-plaintiff ruling, the District Court denied class certification. The plaintiffs, the District Court determined, had failed to establish that China Agritech stock traded on an efficient market—a necessity for proving reliance on a classwide basis. App. 192. Dean's counsel then published a notice informing shareholders of the certification denial and advising: "You must act yourself to protect your rights. You may protect your rights by joining in the current Action as a plaintiff or by filing your own action against China Agritech." *Id.*, at 281–282. The *Dean* action settled in September 2012, occasioning dismissal of the suit. See 857 F. 3d 994, 998 (CA9 2017).

On October 4, 2012—within the two-year statute of limitations—Dean's counsel filed a new complaint (*Smyth*)

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582 U. S. ___, ___ (2017) (slip op., at 5) (internal quotation marks omitted). A statute of repose, by contrast, "begin[s] to run on the date of the last culpable act or omission of the defendant." *Ibid.* (internal quotation marks omitted).

with a new set of plaintiffs and new efficient-market evidence. Eight shareholders responded to the PSLRA notice, seeking lead-plaintiff appointment. The District Court again denied class certification, this time on typicality and adequacy grounds. See App. 254. Thereafter, the *Smyth* plaintiffs settled their individual claims with the defendants and voluntarily dismissed their suit. Because the *Smyth* litigation was timely commenced, putative class members who promptly initiated *individual* suits in the wake of the class-action denial would have encountered no statute of limitations bar.

Respondent Michael Resh, who had not sought lead-plaintiff status in either the *Dean* or *Smyth* proceedings and was represented by counsel who had not appeared in the earlier actions, filed the present suit on June 30, 2014, styling it a class action—a year and a half after the statute of limitations expired. The other respondents moved to intervene, seeking designation as lead plaintiffs; together with Resh, they filed an amended complaint. The District Court dismissed the class complaint as untimely, holding that the *Dean* and *Smyth* actions did not toll the time to initiate class claims. App. to Pet. for Cert. 36a.

The Court of Appeals for the Ninth Circuit reversed: "[P]ermitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling," the court reasoned, "would advance the policy objectives that led the Supreme Court to permit tolling in the first place." 857 F. 3d, at 1004. Applying *American Pipe* tolling to successive class actions, the Ninth Circuit added, would cause no unfair surprise to defendants and would promote economy of litigation by reducing incentives for filing protective class suits during the pendency of an initial certification motion. 857 F. 3d, at 1004.

We granted certiorari, 583 U. S. ___ (2017), in view of a division of authority among the Courts of Appeals over whether otherwise-untimely successive class claims may be salvaged by *American Pipe* tolling. Compare the instant case and *Phipps* v. *Wal-Mart Stores, Inc.*, 792 F. 3d 637, 652–653 (CA6 2015) (applying *American Pipe* tolling to successive class action), with, *e.g., Basch* v. *Ground Round, Inc.*, 139 F. 3d 6, 11 (CA1 1998) ("Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely."); *Griffin* v. *Singletary*, 17 F. 3d 356, 359 (CA11 1994) (similar); *Korwek* v. *Hunt*, 827 F. 2d 874, 879 (CA2 1987) (*American Pipe* does not apply to successive class suits); *Salazar-Calderon* v. *Presidio Valley Farmers Assn.*, 765 F. 2d 1334, 1351 (CA5 1985) ("Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely, nor have we found any."). See also *Yang* v. *Odom*, 392 F. 3d 97, 112 (CA3 2004) (*American Pipe* tolling does not apply to successive class actions where certification was previously denied due to a class defect, but does apply when certification was denied based on the putative representative's deficiencies).

II

A

American Pipe established that "the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." 414 U. S., at 553. "A contrary rule," the Court reasoned in *American Pipe*, "would deprive [Federal Rule of Civil Procedure] 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." *Ibid.* This is so, the Court explained, because without tolling, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *Ibid.* In *Crown, Cork*, the Court further elaborated: Failure to extend the *American Pipe* rule "to class members filing separate actions," in addition to those who move to intervene, would result in "a needless multiplicity of actions" filed by class members preserving their individual claims—"precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." 462 U. S., at 351.

American Pipe and *Crown, Cork* addressed only putative class members who wish to sue individually after a class-certification denial. See, *e.g., American Pipe*, 414 U. S., at 552 (addressing "privilege of intervening in an individual suit"); *Crown, Cork*, 462 U. S., at 349 (applying *American Pipe* to those who "file individual actions"); 462 U. S., at 352 (tolling benefits "class members who choose to file separate suits").

What about a putative class representative, like Resh, who brings his claims as a new class action after the statute of limitations has expired? Neither decision so much as hints that tolling extends to otherwise time-barred class claims. We hold that *American Pipe* does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action. The "efficiency and economy of litigation" that support tolling of individual claims, *American Pipe*, 414 U. S., at 553, do not support maintenance of untimely successive class actions; any additional *class* filings should be made early on, soon after the commencement of the first action seeking class certification.

American Pipe tolls the limitation period for individual claims because economy of litigation favors delaying those claims until after a class-certification denial. If certification is granted, the claims will proceed as a class and there would be no need for the assertion of any claim individually. If certification is denied, only then would it be necessary to pursue claims individually.

With class claims, on the other hand, efficiency favors early assertion of competing class representative claims. If class treatment is appropriate, and all would-be representatives have come forward, the district court can select the best plaintiff with knowledge of the full array of potential class representatives and class counsel. And if the class mechanism is not a viable option for the claims, the decision denying certification will be made at the outset of the case, litigated once for all would-be class representatives.[2]

Rule 23 evinces a preference for preclusion of untimely successive class actions by instructing that class certification should be resolved early on. See Fed. Rule Civ. Proc. 23(c)(1)(A). Indeed, Rule 23(c) was amended in 2003 to permit district courts to take account of multiple class-representative filings. Before the amendment, Rule 23(c) encouraged district courts to issue certification rulings "as soon as practicable." The amendment changed the recommended timing target to "an early practicable time." The alteration was made to allow greater leeway, more time for class discovery, and additional time to "explore designation of class counsel" and consider "additional

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[2] Encouraging early class filings will help ensure sufficient time remains under the statute of limitations, in the event that certification is denied for one of the actions or a portion of the class. Subclasses might be pleaded in one or more complaints and taken up if necessary; as class discovery proceeds and weaknesses in the class theory or adequacy of representation come to light, the lead complaint might be amended or a new plaintiff might intervene. See Brief of Plaintiffs in Post-*Dukes* Successor Class Actions as *Amici Curiae* 8–10 (describing regional subclasses asserted in the *Dukes* v. *Wal-Mart* litigation following this Court's decision decertifying the nationwide class, *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338 (2011)); Pierce, Improving Predictability and Consistency in Class Action Tolling, 23 Geo. Mason L. Rev. 339, 349 (2016) (some *Dukes* plaintiffs moved to amend the original complaint to replead subclasses).

[class counsel] applications rather than deny class certification," thus "afford[ing] the best possible representation for the class." Advisory Committee's 2003 Note on subds. (c)(1)(A) and (g)(2)(A) of Fed. Rule Civ. Proc. 23, 28 U. S. C. App., pp. 815, 818; see Willging & Lee, From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation after *Ortiz*, 58 U. Kan. L. Rev. 775, 785 (2010) (2003 amendments "raised the standard for certifying a class from an early, conditional ruling to a later, relatively final decision" and "expand[ed] the opportunity for parties to engage in discovery prior to moving for class certification").

The PSLRA, which governs this litigation, evinces a similar preference, this time embodied in legislation, for grouping class-representative filings at the outset of litigation. See *supra,* at 3. When the *Dean* and *Smyth* timely commenced actions were first filed, counsel put any shareholder who might wish to serve as lead plaintiff on notice of the action. Several heeded the call—six in *Dean* and eight in *Smyth*. See 857 F. 3d, at 997–998. The PSLRA, by requiring notice of the commencement of a class action, aims to draw all potential lead plaintiffs into the suit so that the district court will have the full roster of contenders before deciding which contender to appoint.[3]

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[3] Although the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737, includes a presumption that the most adequate plaintiff is the one who moves first and has the largest financial interest in the case, see 15 U. S. C. §78u–4(a)(3)(B)(iii)(I), multiple potential lead plaintiffs have reason to apply for the role because there may not be an obvious candidate. Which plaintiff has the largest financial interest may not be immediately apparent; the statute does not define the term, and the size of a shareholder's financial interest can depend on how many shares were purchased and sold, when, and at what price, as well as the order in which the losses are tallied. See, *e.g., Cortina* v. *Anavex Life Sciences Corp.*, 2016 WL 1337305 (SDNY, Apr. 5, 2016). District courts often permit aggregation of plaintiffs into plaintiff groups, so even a small shareholder could apply for lead-plaintiff

See Brief for Securities Industry and Financial Markets Association as *Amicus Curiae* 12–13 (PSLRA "seeks to achieve Congress['] goal of curbing duplicative . . . litigation by encouraging all interested parties to apply to serve as lead plaintiff at the early stages of the case [and] providing for the consolidation of similar class actions"). With notice and the opportunity to participate in the first (and second) round of class litigation, there is little reason to allow plaintiffs who passed up those opportunities to enter the fray several years after class proceedings first commenced.

Ordinarily, to benefit from equitable tolling, plaintiffs must demonstrate that they have been diligent in pursuit of their claims. See, *e.g., McQuiggin* v. *Perkins*, 569 U. S. 383, 391 (2013); *Menominee Tribe of Wis.* v. *United States*, 577 U. S. ___, ___ (2016) (slip op., at 5). Even *American Pipe*, which did not analyze "criteria of the formal doctrine of equitable tolling in any direct manner," *ANZ*, 582 U. S., at ___–___ (slip op., at 10–11), observed that tolling was permissible in the circumstances because plaintiffs who later intervened to pursue individual claims had not slept on their rights, *American Pipe*, 414 U. S., at 554–555. Those plaintiffs reasonably relied on the class representative, who sued timely, to protect their interests in their individual claims. See *Crown, Cork*, 462 U. S., at 350. A would-be class representative who commences suit after expiration of the limitation period, however, can hardly qualify as diligent in asserting claims and pursuing relief.

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status, hoping to join with other shareholders to create a unit with the largest financial interest. See Choi & Thompson, Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA, 106 Colum. L. Rev. 1489, 1507, 1521, 1530 (2006) (80% of securities class actions in post-PSLRA data sample had two or more co-lead counsel firms). Thus, it is a reasonable expectation that, in litigation governed by the PSLRA, a district court will have several competing candidates for lead plaintiff to choose among.

Her interest in representing the class as lead plaintiff, therefore, would not be preserved by the prior plaintiff's timely filed class suit.

Respondents' proposed reading would allow the statute of limitations to be extended time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation. See *Yang*, 392 F. 3d, at 113 (Alito, J., concurring in part and dissenting in part) (tolling for successive class actions could allow "lawyers seeking to represent a plaintiff class [to] extend the statute of limitations almost indefinitely until they find a district court judge who is willing to certify the class"); *Ewing Industries Corp.* v. *Bob Wines Nursery, Inc.*, 795 F. 3d 1324, 1326 (CA11 2015) (tolling for successive class actions allows plaintiffs "limitless bites at the apple").[4] This prospect points up a further distinction between the individual-claim tolling established by *American Pipe* and tolling for successive class actions. The time to file individual actions once a class action ends is finite, extended only by the time the class suit was pending; the time for filing successive class suits, if tolling were allowed, could be limitless. Respondents' claims happen to be governed by 28 U. S. C. §1658(b)(2)'s five-year statute of repose, so the time to file complaints has a finite end. Statutes of repose, however, are not ubiquitous. See

[4] Respondents observe that in *Smith* v. *Bayer Corp.*, 564 U. S. 299 (2011), we held that federal class-certification denials do not have preclusive effect in subsequent state-court suits, despite concerns about successive class actions. See Brief for Respondents 40–41. But in *Smith*, we were guided by "the fundamental nature of the general rule that only parties can be bound by prior judgments." 564 U. S., at 313 (internal quotation marks omitted). The state-court plaintiffs were not parties to the federal-court litigation, hence they could not be bound by its holding—despite a "stron[g] argument" about the inefficiencies of serial class relitigation supporting the contrary position. *Id.,* at 316. No such countervailing presumption favors Resh's untimely third federal class suit.

Dekalb County Pension Fund v. *Transocean Ltd.*, 817 F. 3d 393, 397 (CA2 2016). Most statutory schemes provide for a single limitation period without any outer limit to safeguard against serial relitigation. Endless tolling of a statute of limitations is not a result envisioned by *American Pipe*.[5]

B

Respondents emphasize that in *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393 (2010), we said that "a class action may be maintained," *id.*, at 398 (internal quotation marks omitted), if the requirements of Rule 23(a) and (b) are satisfied, and "Rule 23 *automatically* applies in all civil actions and proceedings in the United States district courts," *id.,* at 400 (internal quotation marks omitted). See Brief for Respondents 21–23. If Resh's suit meets the requirements of Rule 23(a) and (b), respondents assert, there is no reason why Resh's suit cannot proceed as a class action. *Shady Grove* does not call for that outcome. In *Shady Grove*, the Court held that a federal diversity action could proceed under Rule 23 despite a state law prohibiting class treatment of suits

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[5] JUSTICE SOTOMAYOR suggests that the Court might adopt a rule under which tolling "becomes unavailable for future class claims where class certification is denied for a reason that bears on the suitability of the claims for class treatment," but not where "class certification is denied because of the deficiencies of the lead plaintiff as class representative." *Post,* at 5; see *Yang* v. *Odom*, 392 F. 3d 97, 112 (CA3 2004) (embracing similar rule). But Rule 23 contains no instruction to give denials of class certification different effect based on the reason for the denial. And as the Advisory Committee Notes explain, affording district courts time to consider competing claims for class representation will advance the likelihood that lead plaintiff or class counsel deficiencies will be discovered and acted upon early in the litigation. See *supra,* at 7–8. Rule 23 and putative class members' own interests in adequate representation, and the efficient adjudication thereof, weigh heavily against tolling for successive class actions. There is nothing inequitable in following these guides. See *post,* at 5, n. 2.

seeking damages of the kind asserted in the *Shady Grove* complaint. 559 U. S., at 396, 416. Our opinion in *Shady Grove* addressed a case in which a Rule 23 class action could have been maintained absent a contrary state-law command. *Id.*, at 396. Resh's case presents the reverse situation: The class action would be untimely unless saved by *American Pipe*'s equitable-tolling exception to statutes of limitations. Rule 23 itself does not address timeliness of claims or tolling and nothing in the Rule calls for the revival of class claims if individual claims are tolled. In fact, as already explained, Rule 23 prescribes the opposite result. See *supra,* at 6–8.

Today's clarification of *American Pipe*'s reach does not run afoul of the Rules Enabling Act by causing a plaintiff's attempted recourse to Rule 23 to abridge or modify a substantive right. See Brief for Respondents 23–26 (citing *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U. S. ___ (2016)). Plaintiffs have no substantive right to bring their claims outside the statute of limitations. That they may do so, in limited circumstances, is due to a judicially crafted tolling rule that itself does not abridge, enlarge, or modify any substantive right. *American Pipe*, 414 U. S., at 558. Without *American Pipe*, respondents would have no peg to seek tolling here; as we have explained, however, *American Pipe* does not provide for the extension of the statute of limitations sought by Resh for institution of an untimely third class suit.

Respondents urge that *American Pipe*'s logic in fact supports their position because declining to toll the limitation period for successive class suits will lead to a "needless multiplicity" of protective class-action filings. Brief for Respondents 32–34. See also *post,* at 6–7 (expressing concern about duplicative and dueling class actions). But there is little reason to think that protective class filings will substantially increase. Several Courts of Appeals have already declined to read *American Pipe* to permit a successive class action filed outside the limitation period. See *supra,* at 5; 3 W. Rubenstein, Newberg on Class Actions §9:64, n. 5 (5th ed. 2012). These courts include the Second and Fifth Circuits (no strangers to class-action practice); both courts declined to entertain out-of-time class actions in the 1980's. See *Korwek*, 827 F. 2d 874 (CA2 1987); *Salazar-Calderon*, 765 F. 2d 1334 (CA5 1985). Respondents and their *amici* make no showing that these Circuits have experienced a disproportionate number of duplicative, protective class-action filings.

Amicus National Conference on Public Employee Retirement Systems cites examples of protective filings responding to courts' disallowance of *American Pipe* tolling for statutes of repose, but those examples in fact suggest that protective class filings are uncommon. See Brief of the National Conference on Public Employee Retirement Systems as *Amicus Curiae* 7–8. Between dozens and hundreds of class plaintiffs filed protective *individual* claims while class-certification motions were pending in securities cases and the statute of repose was about to run out, placing a permanent bar against their claims. *Ibid.* But none of the plaintiffs appears to have filed a protective *class* action—even though, if the statute of repose expired and the pending class-certification motions were denied, there would be no further opportunity to assert class claims.[6]

Nor do the incentives of class-action practice suggest that many more plaintiffs will file protective class claims as a result of our holding. Any plaintiff whose individual claim is worth litigating on its own rests secure in the

[6] The Second Circuit *Petrobras* litigation, referenced in *amicus*' brief, illustrates that multiple timely class filings do not sow unmanageable chaos. Five class actions were filed there and consolidated, along with individual claims, for pretrial purposes, including class-certification determination. See *In re Petrobras Securities*, 862 F. 3d 250, 258 (CA2 2017).

knowledge that she can avail herself of *American Pipe* tolling if certification is denied to a first putative class. The plaintiff who seeks to preserve the ability to lead the class—whether because her claim is too small to make an individual suit worthwhile or because of an attendant financial benefit[7]—has every reason to file a class action early, and little reason to wait in the wings, giving another plaintiff first shot at representation.

In any event, as previously explained, see *supra,* at 6–8, a multiplicity of class-action filings is not necessarily "needless." Indeed, multiple filings may aid a district court in determining, early on, whether class treatment is warranted, and if so, which of the contenders would be the best representative. And sooner rather than later filings are just what Rule 23 encourages. See *ibid*. Multiple timely filings might not line up neatly; they could be filed in different districts, at different times—perhaps when briefing on class certification has already begun—or on behalf of only partially overlapping classes. See Wasserman, Dueling Class Actions, 80 B. U. L. Rev. 461, 464–465 (2000) (describing variety of "dueling" class filings). But district courts have ample tools at their disposal to manage the suits, including the ability to stay, consolidate, or transfer proceedings. District courts are increasingly familiar with overseeing such complex cases, given the surge in multidistrict litigation. See Cabraser & Issacharoff, The Participatory Class Action, 92 N. Y. U. L. Rev. 846, 850–851 (2017) (multidistrict litigation frequently combines individual suits and multiple putative class actions). The Federal Rules provide a range of mechanisms to aid courts in this endeavor. What the Rules do not offer is a reason to permit plaintiffs to exhume failed

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[7] The class representative might receive a share of class recovery above and beyond her individual claim. See, *e.g., Cook* v. *Niedert,* 142 F. 3d 1004, 1016 (CA7 1998) (affirming class representative's $25,000 incentive award).

class actions by filing new, untimely class claims.

*   *   *

The watchwords of *American Pipe* are efficiency and economy of litigation, a principal purpose of Rule 23 as well. Extending *American Pipe* tolling to successive class actions does not serve that purpose. The contrary rule, allowing no tolling for out-of-time class actions, will propel putative class representatives to file suit well within the limitation period and seek certification promptly. For all the above-stated reasons, it is the rule we adopt today: Time to file a class action falls outside the bounds of *American Pipe*.

Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 17–432

CHINA AGRITECH, INC., PETITIONER *v.* MICHAEL H. RESH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 11, 2018]

JUSTICE SOTOMAYOR, concurring in the judgment.

I agree with the Court that in cases governed by the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U. S. C. §78u–4, like this one, a plaintiff who seeks to bring a successive class action may not rely on the tolling rule established by *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538 (1974). I cannot, however, join the majority in going further by holding that the same is true for class actions not subject to the PSLRA.

I

A

To understand why the PSLRA is essential to the conclusion the Court reaches here, recall that this case involves a putative class-action lawsuit brought by a plaintiff with a timely individual claim, joined by coplaintiffs with timely individual claims, on behalf of a putative class of absent class members with timely individual claims. See *ante,* at 4. One might naturally think, then, that the class claims in the lawsuit are timely. The majority, however, concludes that the named plaintiffs' and putative class members' class claims are time barred.

At first blush, this result might seem surprising, for the Court has rejected the idea that class claims are categorically different from individual claims. See *Shady Grove*

Orthopedic Associates, P. A. v. *Allstate Ins. Co.*, 559 U. S. 393, 398 (2010). Although it did not hold that class claims may never be treated differently from individual claims, *Shady Grove* indicates that there must be a special reason for doing so.

Here, the PSLRA supplies that special reason. The PSLRA imposes significant procedural requirements on securities class actions that do not apply to individual or traditionally joined securities claims. See §78u–4(a)(1).

Foremost among these requirements is a process for the "[a]ppointment of lead plaintiff." §78u–4(a)(3). Under the PSLRA, the named plaintiff in a putative class action must publish within 20 days of filing the complaint a nationwide notice alerting putative class members to the filing of the suit and informing them that, "not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff." §78u–4(a)(3)(A)(i). The district court then must evaluate all prospective lead plaintiffs and choose the "most adequate" one based on a set of enumerated considerations. §78u–4(a)(3)(B). The PSLRA thus contemplates a process by which all prospective class representatives come forward in the first-filed class action and make their arguments to the court for lead-plaintiff status. See H. R. Conf. Rep. No. 104–369, p. 32 (1995).

Respondents here bypassed that statutory process. They do not dispute that notice was published in the two earlier-filed putative class actions concerning the same securities claims as here, as required by the PSLRA. Yet they did not seek to be chosen lead plaintiffs in either of those actions. See *ante,* at 3–4, 8. For that reason alone, I agree with the majority that respondents "can hardly qualify as diligent in asserting [class] claims and pursuing relief." *Ante,* at 9. Respondents' failure to utilize the PSLRA's lead-plaintiff selection procedure distinguishes them from the *American Pipe* absent class members, who were subject only to the traditional Federal Rule of Civil Procedure 23 class procedure, which is "designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." 414 U. S., at 550.

Unlike the PSLRA, Rule 23 contains no requirement of precertification notice to absent putative class members; it provides only for postcertification notice. See Fed. Rule Civ. Proc. 23(c)(2). There thus is no mechanism for absent putative class members to learn that a putative class action is pending, much less that they are entitled to seek to displace the named plaintiff in that lawsuit as class representative. Also unlike the PSLRA, Rule 23 contains no process for a district court to choose from among the various candidates for lead plaintiff, nor does it specify what would make a person the most adequate representative of the class. See 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1765, p. 321 (3d ed. 2005). In class actions not subject to the PSLRA, the class representative is generally the first person who files the suit, and so is self-selected (subject to an adequacy determination), rather than selected by the court.[1] See Rule 23(a)(4) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . the representative parties will fairly and adequately protect the interests of the class"); Rule 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine

[1] There may, of course, be competition among putative class members to proceed on behalf of the putative class in an action not governed by the PSLRA, and the district court generally considers their relative qualities. But the point is that the court is not required by Rule 23 to identify and designate as lead plaintiff the person most capable of adequately representing the class; it is only required to determine for certification purposes whether the class representative adequately represents the class. See 7A Wright, Federal Practice and Procedure §1765, at 321.

by order whether to certify the action as a class action"); H. R. Conf. Rep. No. 104–369, at 33–35.

The majority points to Rule 23(c)'s requirement that the determination whether to certify a class be made at "'an early practicable time,'" *ante,* at 7, but there is no significance to that requirement with respect to the diligence of would-be class representatives. The Advisory Committee notes accompanying the 2003 amendment to Rule 23(c), which changed the recommended timing for a certification determination from "as soon as practicable" to "at an early practicable time," explained that the change would permit time for "controlled discovery into the 'merits,'" efforts by defendants "to win dismissal or summary judgment as to the individual plaintiffs without certification," and the considered "designation of class counsel." Advisory Committee's 2003 Notes on subd. (c)(1)(A) of Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 815. The notes say nothing about lead-plaintiff selection, and Rule 23(c) in no way ensures that potential lead plaintiffs know about the putative class action or about their opportunity to represent the class.

Given these important differences between Rule 23's general class procedures and the specific procedures imposed by the PSLRA, the majority's conclusion that absent class members were not diligent because they failed to ask to be the class representative in a prior suit makes sense only in the PSLRA context. The same conclusion simply does not follow in the generic Rule 23 context, where absent class members are most likely unaware of the existence of a putative class action. Cf. *American Pipe*, 414 U. S., at 551–552 (explaining that even absent class members who are unaware of the putative class action are entitled to tolling).

B

In addition to its focus on plaintiff diligence, the majority offers a separate line of reasoning to support its broad holding. It explains that its limitation on *American Pipe* tolling is necessary to prevent a "limitless" series of class actions, each rendered timely by the tolling effect of the previous ones. *Ante*, at 10. As the majority acknowledges, however, there is no such risk in this case, see *ibid.*, because the applicable statute of repose puts a 5-year "outer limit on the right to bring a civil action." *CTS Corp.* v. *Waldburger*, 573 U. S. ___, ___ (2014) (slip op., at 6). The majority is right, of course, that in many other types of cases, no statute of repose will apply. See *ante,* at 10–11. But the Court has elsewhere pointed to the power of "comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." *Smith* v. *Bayer Corp.*, 564 U. S. 299, 317 (2011). There is no reason to assume that this existing safeguard will prove inadequate if the Court holds that *American Pipe* tolling is available for successive class actions outside the PSLRA context.

Even if principles of comity prove insufficient such that some modification to the *American Pipe* rule is necessary to prevent indefinite tolling, a narrower form of redress is available. Instead of adopting a blanket no-tolling-of-class-claims-ever rule outside the PSLRA context, the Court might hold, as a matter of equity, that tolling only becomes unavailable for future class claims where class certification is denied for a reason that bears on the suitability of the claims for class treatment. Where, by contrast, class certification is denied because of the deficiencies of the lead plaintiff as class representative, or because of some other nonsubstantive defect, tolling would remain available.[2] See *Yang* v. *Odom*, 392 F. 3d 97, 112 (CA3

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[2] Such an approach would, of course, be "grounded in the traditional equitable powers of the judiciary," which are "the source of the tolling rule applied in *American Pipe*," and not Rule 23, which "does not so

2004). This approach would, for instance, ensure that in cases where the only problem with the first suit was the identity of the named plaintiff, a new and more adequate representative could file another suit to represent the class. Preserving the opportunity for such a fix may seem unimportant in a PSLRA case like this one, where the court in the first-filed case will usually have a choice among possible lead plaintiffs. See *ante,* at 8–9, n. 3. But, as just explained, in class actions not subject to the PSLRA, the certifying court often will have no choice as to the class representative.

Whether this or another rule ultimately is the right one, there is no need for the Court today to reach beyond the facts of this case, where the specter of indefinite tolling is merely hypothetical, and foreclose the possibility of a more tailored approach.

C

Finally, the majority suggests that its broader approach will encourage multiple potential class representatives to come forward early, which may "aid a district court" in making class certification decisions. *Ante,* at 14. This may well be so in the PSLRA context, given the statute's notice requirement and built-in mechanism for selecting the most adequate lead plaintiff. But in suits not covered by the PSLRA, absent class members may not know of the pending class action early enough to "aid" the court, and will likely have to file a completely separate lawsuit if what they seek is lead-plaintiff status.

In addition to increasing the number of unnecessary filings, a result at odds with *American Pipe*'s concern with avoiding "needless duplication," 414 U. S., at 554, the existence of multiple putative class actions covering the

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much as mention the extension or suspension of statutory time bars." *California Public Employees' Retirement System* v. *ANZ Securities, Inc.*, 582 U. S. ___, ___ (2017) (slip op., at 10); see *ante,* at 11, n. 5.

same harm to the same class may lead to a "race toward judgment or settlement." Wasserman, Dueling Class Actions, 80 B. U. L. Rev. 461, 472 (2000). Each class lawyer knows that only the lawyers in the first-resolved case will get paid, because the other suits will then be dismissed on claim-preclusion grounds. *Ibid.* Defense lawyers know this, too, so they are "able to engage in a 'reverse auction,' pitting the various class counsel against one another and agreeing to settle with the lawyer willing to accept the lowest bid on behalf of the class." *Id.,* at 473. This gamesmanship is not in class members' interest, nor in the interest of justice. I therefore think it unwise to encourage the filing of such dueling class actions outside the PSLRA context.

II

Although there is ample support for denying *American Pipe* tolling to successive class actions subject to the PSLRA, the majority's reasoning does not justify denying *American Pipe* tolling to other successive class actions. The majority could have avoided this error by limiting its decision to the issues presented by the facts of this case.

Despite the Court's misstep in adopting an unnecessarily broad rule, district courts can help mitigate the potential unfairness of denying *American Pipe* tolling to class claims not subject to the PSLRA. Where appropriate, district courts should liberally permit amendment of the pleadings or intervention of new plaintiffs and counsel.

Because I agree with the majority's conclusion just as applied to class actions governed by the PSLRA, like this one, I concur only in the judgment.

NOTES

10

Certiorari to the United States Court of Appeals for the Seventh Circuit, *In re: Epic Systems Corp. v. Lewis*, No. 16-285 (U.S. 2018)

Submitted by:
Sharon Robertson
Cohen Milstein Sellers & Toll PLLC

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

EPIC SYSTEMS CORP. *v.* LEWIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 16–285. Argued October 2, 2017—Decided May 21, 2018*

In each of these cases, an employer and employee entered into a contract providing for individualized arbitration proceedings to resolve employment disputes between the parties. Each employee nonetheless sought to litigate Fair Labor Standards Act and related state law claims through class or collective actions in federal court. Although the Federal Arbitration Act generally requires courts to enforce arbitration agreements as written, the employees argued that its "saving clause" removes this obligation if an arbitration agreement violates some other federal law and that, by requiring individualized proceedings, the agreements here violated the National Labor Relations Act. The employers countered that the Arbitration Act protects agreements requiring arbitration from judicial interference and that neither the saving clause nor the NLRA demands a different conclusion. Until recently, courts as well as the National Labor Relations Board's general counsel agreed that such arbitration agreements are enforceable. In 2012, however, the Board ruled that the NLRA effectively nullifies the Arbitration Act in cases like these, and since then other courts have either agreed with or deferred to the Board's position.

Held: Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise. Pp. 5–25.

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*Together with No. 16–300, *Ernst & Young LLP et al.* v. *Morris et al.*, on certiorari to the United States Court of Appeals for the Ninth Circuit, and No. 16–307, *National Labor Relations Board* v. *Murphy Oil USA, Inc., et al.*, on certiorari to the United States Court of Appeals for the Fifth Circuit.

Syllabus

(a) The Arbitration Act requires courts to enforce agreements to arbitrate, including the terms of arbitration the parties select. See 9 U. S. C. §§2, 3, 4. These emphatic directions would seem to resolve any argument here. The Act's saving clause—which allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," §2—recognizes only "'generally applicable contract defenses, such as fraud, duress, or unconscionability,'" *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 339, not defenses targeting arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration," *id.*, at 344. By challenging the agreements precisely because they require individualized arbitration instead of class or collective proceedings, the employees seek to interfere with one of these fundamental attributes. Pp. 5–9.

(b) The employees also mistakenly claim that, even if the Arbitration Act normally requires enforcement of arbitration agreements like theirs, the NLRA overrides that guidance and renders their agreements unlawful yet. When confronted with two Acts allegedly touching on the same topic, this Court must strive "to give effect to both." *Morton* v. *Mancari*, 417 U. S. 535, 551. To prevail, the employees must show a "'clear and manifest'" congressional intention to displace one Act with another. *Ibid.* There is a "stron[g] presum[ption]" that disfavors repeals by implication and that "Congress will specifically address" preexisting law before suspending the law's normal operations in a later statute. *United States* v. *Fausto*, 484 U. S. 439, 452, 453.

The employees ask the Court to infer that class and collective actions are "concerted activities" protected by §7 of the NLRA, which guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U. S. C. §157. But §7 focuses on the right to organize unions and bargain collectively. It does not mention class or collective action procedures or even hint at a clear and manifest wish to displace the Arbitration Act. It is unlikely that Congress wished to confer a right to class or collective actions in §7, since those procedures were hardly known when the NLRA was adopted in 1935. Because the catchall term "other concerted activities for the purpose of . . . other mutual aid or protection" appears at the end of a detailed list of activities, it should be understood to protect the same kind of things, *i.e.,* things employees do for themselves in the course of exercising their right to free association in the workplace.

The NLRA's structure points to the same conclusion. After speaking of various "concerted activities" in §7, the statute establishes a detailed regulatory regime applicable to each item on the list, but gives no hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Nor is it at all obvious what rules should govern on such essential issues as opt-out and opt-in procedures, notice to class members, and class certification standards. Telling too is the fact that Congress has shown that it knows exactly how to specify certain dispute resolution procedures, cf., *e.g.,* 29 U. S. C. §§216(b), 626, or to override the Arbitration Act, see, *e.g.,* 15 U. S. C. §1226(a)(2), but Congress has done nothing like that in the NLRA.

The employees suggest that the NLRA does not discuss class and collective action procedures because it means to confer a right to use *existing* procedures provided by statute or rule, but the NLRA does not say even that much. And if employees do take existing rules as they find them, they must take them subject to those rules' inherent limitations, including the principle that parties may depart from them in favor of individualized arbitration.

In another contextual clue, the employees' underlying causes of action arise not under the NLRA but under the Fair Labor Standards Act, which permits the sort of collective action the employees wish to pursue here. Yet they do not suggest that the FLSA displaces the Arbitration Act, presumably because the Court has held that an identical collective action scheme does not prohibit individualized arbitration proceedings, see *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 32. The employees' theory also runs afoul of the rule that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468, as it would allow a catchall term in the NLRA to dictate the particulars of dispute resolution procedures in Article III courts or arbitration proceedings—matters that are usually left to, *e.g.,* the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA. Nor does the employees' invocation of the Norris-LaGuardia Act, a predecessor of the NLRA, help their argument. That statute declares unenforceable contracts in conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U. S. C. §102, and just as under the NLRA, that policy does not conflict with Congress's directions favoring arbitration.

Precedent confirms the Court's reading. The Court has rejected many efforts to manufacture conflicts between the Arbitration Act and other federal statutes, see, *e.g. American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228; and its §7 cases have generally involved efforts related to organizing and collective bargaining in the workplace, not the treatment of class or collective action procedures in court or arbitration, see, *e.g., NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9.

Finally, the employees cannot expect deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, because *Chevron*'s essential premises are missing. The Board sought not to interpret just the NLRA, "which it administers," *id.,* at 842, but to interpret that statute in a way that limits the work of the Arbitration Act, which the agency does not administer. The Board and the Solicitor General also dispute the NLRA's meaning, articulating no single position on which the Executive Branch might be held "accountable to the people." *Id.,* at 865. And after "employing traditional tools of statutory construction," *id.,* at 843, n. 9, including the canon against reading conflicts into statutes, there is no unresolved ambiguity for the Board to address. Pp. 9–21.

No. 16–285, 823 F. 3d 1147, and No. 16–300, 834 F. 3d 975, reversed and remanded; No. 16–307, 808 F. 3d 1013, affirmed.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

Nos. 16–285, 16–300, 16–307

EPIC SYSTEMS CORPORATION, PETITIONER
16–285 *v.*
JACOB LEWIS;

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ERNST & YOUNG LLP, ET AL., PETITIONERS
16–300 *v.*
STEPHEN MORRIS, ET AL.; AND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER
16–307 *v.*
MURPHY OIL USA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May 21, 2018]

JUSTICE GORSUCH delivered the opinion of the Court.

Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?

As a matter of policy these questions are surely debatable. But as a matter of law the answer is clear. In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees' suggestion that the National Labor Relations Act (NLRA) offers a conflicting command. It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another. And abiding that duty here leads to an unmistakable conclusion. The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful.

I

The three cases before us differ in detail but not in substance. Take *Ernst & Young LLP* v. *Morris*. There Ernst & Young and one of its junior accountants, Stephen Morris, entered into an agreement providing that they would arbitrate any disputes that might arise between them. The agreement stated that the employee could choose the arbitration provider and that the arbitrator could "grant any relief that could be granted by . . . a court" in the relevant jurisdiction. App. in No. 16–300, p. 43. The agreement also specified individualized arbitration, with claims "pertaining to different [e]mployees [to] be heard in separate proceedings." *Id.,* at 44.

After his employment ended, and despite having agreed to arbitrate claims against the firm, Mr. Morris sued Ernst & Young in federal court. He alleged that the firm had misclassified its junior accountants as professional employees and violated the federal Fair Labor Standards Act (FLSA) and California law by paying them salaries without overtime pay. Although the arbitration agreement provided for individualized proceedings, Mr. Morris sought to litigate the federal claim on behalf of a nationwide class under the FLSA's collective action provision, 29 U. S. C. §216(b). He sought to pursue the state law claim as a class action under Federal Rule of Civil Procedure 23.

Ernst & Young replied with a motion to compel arbitration. The district court granted the request, but the Ninth Circuit reversed this judgment. 834 F. 3d 975 (2016). The Ninth Circuit recognized that the Arbitration Act generally requires courts to enforce arbitration agreements as written. But the court reasoned that the statute's "saving clause," see 9 U. S. C. §2, removes this obligation if an arbitration agreement violates some other federal law. And the court concluded that an agreement requiring individualized arbitration proceedings violates the NLRA by barring employees from engaging in the "concerted activit[y]," 29 U. S. C. §157, of pursuing claims as a class or collective action.

Judge Ikuta dissented. In her view, the Arbitration Act protected the arbitration agreement from judicial interference and nothing in the Act's saving clause suggested otherwise. Neither, she concluded, did the NLRA demand a different result. Rather, that statute focuses on protecting unionization and collective bargaining in the workplace, not on guaranteeing class or collective action procedures in disputes before judges or arbitrators.

Although the Arbitration Act and the NLRA have long coexisted—they date from 1925 and 1935, respectively—the suggestion they might conflict is something quite new. Until a couple of years ago, courts more or less agreed that arbitration agreements like those before us must be enforced according to their terms. See, *e.g., Owen* v. *Bristol Care, Inc.*, 702 F. 3d 1050 (CA8 2013); *Sutherland* v. *Ernst & Young LLP*, 726 F. 3d 290 (CA2 2013); *D. R. Horton, Inc.* v. *NLRB*, 737 F. 3d 344 (CA5 2013); *Iskanian* v. *CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 327 P. 3d 129 (2014); *Tallman* v. *Eighth Jud. Dist. Court*, 131 Nev. 71, 359 P. 3d 113 (2015); 808 F. 3d 1013 (CA5 2015) (case below in No. 16–307).

The National Labor Relations Board's general counsel expressed much the same view in 2010. Remarking that employees and employers "can benefit from the relative simplicity and informality of resolving claims before arbitrators," the general counsel opined that the validity of such agreements "does not involve consideration of the policies of the National Labor Relations Act." Memorandum GC 10–06, pp. 2, 5 (June 16, 2010).

But recently things have shifted. In 2012, the Board—for the first time in the 77 years since the NLRA's adoption—asserted that the NLRA effectively nullifies the Arbitration Act in cases like ours. *D. R. Horton, Inc.*, 357 N. L. R. B. 2277. Initially, this agency decision received a cool reception in court. See *D. R. Horton*, 737 F. 3d, at 355–362. In the last two years, though, some circuits have either agreed with the Board's conclusion or thought themselves obliged to defer to it under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). See 823 F. 3d 1147 (CA7 2016) (case below in No. 16–285); 834 F. 3d 975 (case below in No. 16–300); *NLRB* v. *Alternative Entertainment, Inc.*, 858 F. 3d 393 (CA6 2017). More recently still, the disagreement has grown as the Executive has disavowed the Board's (most recent) position, and the Solicitor General and the Board have offered us battling briefs about the law's meaning. We granted certiorari to clear the confusion. 580 U. S. ___ (2017).

II

We begin with the Arbitration Act and the question of its saving clause.

Congress adopted the Arbitration Act in 1925 in response to a perception that courts were unduly hostile to arbitration. No doubt there was much to that perception. Before 1925, English and American common law courts routinely refused to enforce agreements to arbitrate disputes. *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 510, n. 4 (1974). But in Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved. *Id.*, at 511. So Congress directed courts to abandon their hostility and instead treat arbitration agreements as "valid, irrevocable, and enforceable." 9 U. S. C. §2. The Act, this Court has said, establishes "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24 (1983) (citing *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967)); see *id.,* at 404 (discussing "the plain meaning of the statute" and "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts").

Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties' chosen arbitration procedures. See §3 (providing for a stay of litigation pending arbitration "in accordance with the terms of the agreement"); §4 (providing for "an order directing that . . . arbitration proceed in the manner provided for in such agreement"). Indeed, we have often observed that the Arbitration Act requires courts "rigorously" to "enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted." *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228, 233 (2013) (some emphasis added; citations, internal quotation marks, and brackets omitted).

On first blush, these emphatic directions would seem to resolve any argument under the Arbitration Act. The parties before us contracted for arbitration. They proceeded to specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures. And this much the Arbitration Act seems to protect pretty absolutely. See *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011); *Italian Colors*, *supra*; *DIRECTV, Inc.* v. *Imburgia*, 577 U. S. ___ (2015). You might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments. You might even ask if the Act was good policy when enacted. But all the same you might find it difficult to see how to avoid the statute's application.

Still, the employees suggest the Arbitration Act's saving clause creates an exception for cases like theirs. By its terms, the saving clause allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract." §2. That provision applies here, the employees tell us, because the NLRA renders their particular class and collective action waivers illegal. In their view, illegality under the NLRA is a "ground" that "exists at law . . . for the revocation" of their arbitration agreements, at least to the extent those agreements prohibit class or collective action proceedings.

The problem with this line of argument is fundamental. Put to the side the question whether the saving clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes. See 834 F. 3d, at 991–992, 997 (Ikuta, J., dissenting). Put to the side the question of what it takes to qualify as a ground for "revocation" of a contract. See *Concepcion*, *supra,* at 352–355 (THOMAS, J., concurring); *post,* at 1–2 (THOMAS, J., concurring). Put to the side for the moment, too, even the question whether the NLRA actually renders class and collective action waivers illegal. Assuming (but not granting) the employees could satisfactorily answer all those questions, the saving clause still can't save their cause.

It can't because the saving clause recognizes only defenses that apply to "any" contract. In this way the clause establishes a sort of "equal-treatment" rule for arbitration contracts. *Kindred Nursing Centers L. P.* v. *Clark*, 581 U. S. ___, ___ (2017) (slip op., at 4). The clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Concepcion*, 563 U. S., at 339. At the same time, the clause offers no refuge for "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Ibid.* Under our precedent, this means the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration." *Id.*, at 344; see *Kindred Nursing*, *supra,* at ___ (slip op., at 5).

This is where the employees' argument stumbles. They don't suggest that their arbitration agreements were extracted, say, by an act of fraud or duress or in some other unconscionable way that would render *any* contract unenforceable. Instead, they object to their agreements precisely because they require individualized arbitration proceedings instead of class or collective ones. And by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes.

We know this much because of *Concepcion*. There this Court faced a state law defense that prohibited as unconscionable class action waivers in consumer contracts. The Court readily acknowledged that the defense formally applied in both the litigation and the arbitration context. 563 U. S., at 338, 341. But, the Court held, the defense failed to qualify for protection under the saving clause because it interfered with a fundamental attribute of arbitration all the same. It did so by effectively permitting any party in arbitration to demand classwide proceedings despite the traditionally individualized and informal nature of arbitration. This "fundamental" change to the traditional arbitration process, the Court said, would "sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.,* at 347, 348. Not least, *Concepcion* noted, arbitrators would have to decide whether the named class representatives are sufficiently representative and typical of the class; what kind of notice, opportunity to be heard, and right to opt out absent class members should enjoy; and how discovery should be altered in light of the classwide nature of the proceedings. *Ibid.* All of which would take much time and effort, and introduce new risks and costs for both sides. *Ibid.* In the Court's judgment, the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace.

Of course, *Concepcion* has its limits. The Court recognized that parties remain free to alter arbitration procedures to suit their tastes, and in recent years some parties have sometimes chosen to arbitrate on a classwide basis. *Id.*, at 351. But *Concepcion*'s essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent. *Id.*, at 344–351; see also *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l*

Corp., 559 U. S. 662, 684–687 (2010). Just as judicial antagonism toward arbitration before the Arbitration Act's enactment "manifested itself in a great variety of devices and formulas declaring arbitration against public policy," *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today. 563 U. S., at 342 (internal quotation marks omitted). And a rule seeking to declare individualized arbitration proceedings off limits is, the Court held, just such a device.

The employees' efforts to distinguish *Concepcion* fall short. They note that their putative NLRA defense would render an agreement "illegal" as a matter of federal statutory law rather than "unconscionable" as a matter of state common law. But we don't see how that distinction makes any difference in light of *Concepion*'s rationale and rule. Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable *just because it requires bilateral arbitration* is a different creature. A defense of that kind, *Concepcion* tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability. The law of precedent teaches that like cases should generally be treated alike, and appropriate respect for that principle means the Arbitration Act's saving clause can no more save the defense at issue in these cases than it did the defense at issue in *Concepcion*. At the end of our encounter with the Arbitration Act, then, it appears just as it did at the beginning: a congressional command requiring us to enforce, not override, the terms of the arbitration agreements before us.

III

But that's not the end of it. Even if the Arbitration Act normally requires us to enforce arbitration agreements like theirs, the employees reply that the NLRA overrides that guidance in these cases and commands us to hold their agreements unlawful yet.

This argument faces a stout uphill climb. When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "'to give effect to both.'" *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974). A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "'a clearly expressed congressional intention'" that such a result should follow. *Vimar Seguros y Reaseguros, S. A.* v. *M/V Sky Reefer*, 515 U. S. 528, 533 (1995). The intention must be "'clear and manifest.'" *Morton*, *supra*, at 551. And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute. *United States* v. *Fausto*, 484 U. S. 439, 452, 453 (1988).

These rules exist for good reasons. Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.

Seeking to demonstrate an irreconcilable statutory conflict even in light of these demanding standards, the employees point to Section 7 of the NLRA. That provision guarantees workers

> "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §157.

From this language, the employees ask us to infer a clear and manifest congressional command to displace the Arbitration Act and outlaw agreements like theirs.

But that much inference is more than this Court may make. Section 7 focuses on the right to organize unions and bargain collectively. It may permit unions to bargain to prohibit arbitration. Cf. *14 Penn Plaza LLC* v. *Pyett*, 556 U. S. 247, 256–260 (2009). But it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand.

Neither should any of this come as a surprise. The notion that Section 7 confers a right to class or collective actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935. Federal Rule of Civil Procedure 23 didn't create the modern class action until 1966; class arbitration didn't emerge until later still; and even the Fair Labor Standards Act's collective action provision postdated Section 7 by years. See Rule 23–Class Actions, 28 U. S. C. App., p. 1258 (1964 ed., Supp. II); 52 Stat. 1069; *Concepcion*, 563 U. S., at 349; see also *Califano* v. *Yamasaki*, 442 U. S. 682, 700–701 (1979) (noting that the "usual rule" then was litigation "conducted by and on behalf of individual named parties only"). And while some forms of group litigation existed even in 1935, see 823 F. 3d, at 1154, Section 7's failure to mention them only reinforces that the statute doesn't speak to such procedures.

A close look at the employees' best evidence of a potential conflict turns out to reveal no conflict at all. The employees direct our attention to the term "other concerted activities for the purpose of . . . other mutual aid or protection." This catchall term, they say, can be read to include class and collective legal actions. But the term appears at the end of a detailed list of activities speaking of "self-organization," "form[ing], join[ing], or assist[ing] labor organizations," and "bargain[ing] collectively." 29 U. S. C. §157. And where, as here, a more general term follows more specific terms in a list, the general term is usually understood to "'embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 115 (2001) (discussing *ejusdem generis* canon); *National Assn. of Mfrs.* v. *Department of Defense*, 583 U. S. ___, ___ (2018) (slip op., at 10). All of which suggests that the term "other concerted activities" should, like the terms that precede it, serve to protect things employees "just do" for themselves in the course of exercising their right to free association in the workplace, rather than "the highly regulated, courtroom-bound 'activities' of class and joint litigation." *Alternative Entertainment*, 858 F. 3d, at 414–415 (Sutton, J., concurring in part and dissenting in part) (emphasis deleted). None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors.

The NLRA's broader structure underscores the point. After speaking of various "concerted activities" in Section 7, Congress proceeded to establish a regulatory regime applicable to each of them. The NLRA provides rules for the recognition of exclusive bargaining representatives, 29 U. S. C. §159, explains employees' and employers' obligation to bargain collectively, §158(d), and conscribes certain labor organization practices, §§158(a)(3), (b). The NLRA also touches on other concerted activities closely related to organization and collective bargaining, such as picketing, §158(b)(7), and strikes, §163. It even sets rules for adjudicatory proceedings under the NLRA itself. §§160, 161. Many of these provisions were part of the original NLRA in 1935, see 49 Stat. 449, while others were added later. But missing entirely from this careful regime is any hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Without some comparably specific guidance, it's not at all obvious what procedures Section 7 might protect. Would opt-out class action procedures suffice? Or would opt-in procedures be necessary? What notice might be owed to absent class members? What standards would govern class certification? Should the same rules always apply or should they vary based on the nature of the suit? Nothing in the NLRA even whispers to us on any of these essential questions. And it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in Section 7 yet remain mute about this matter alone—unless, of course, Section 7 doesn't speak to class and collective action procedures in the first place.

Telling, too, is the fact that when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so. Congress has spoken often and clearly to the procedures for resolving "actions," "claims," "charges," and "cases" in statute after statute. *E.g.,* 29 U. S. C. §§216(b), 626; 42 U. S. C. §§2000e–5(b), (f)(3)–(5). Congress has likewise shown that it knows how to override the Arbitration Act when it wishes—by explaining, for example, that, "[n]otwithstanding any other provision of law, . . . arbitration may be used . . . only if" certain conditions are met, 15 U. S. C. §1226(a)(2); or that "[n]o predispute arbitration agreement shall be valid or enforceable" in other circumstances, 7 U. S. C. §26(n)(2); 12 U. S. C. §5567(d)(2); or that requiring a party to arbitrate is "unlawful" in other circumstances yet, 10 U. S. C. §987(e)(3). The fact that we have nothing like that here is further evidence that Section 7 does nothing to address the question of class and collective actions.

In response, the employees offer this slight reply. They suggest that the NLRA doesn't discuss any particular class and collective action procedures because it merely confers a right to use *existing* procedures provided by statute or rule, "on the same terms as [they are] made available to everyone else." Brief for Respondent in No. 16–285, p. 53, n. 10. But of course the NLRA doesn't say even that much. And, besides, if the parties really take existing class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures of their own design.

Still another contextual clue yields the same message. The employees' underlying causes of action involve their wages and arise not under the NLRA but under an entirely different statute, the Fair Labor Standards Act. The FLSA allows employees to sue on behalf of "themselves and other employees similarly situated," 29 U. S. C. §216(b), and it's precisely this sort of collective action the employees before us wish to pursue. Yet they do not offer the seemingly more natural suggestion that the FLSA overcomes the Arbitration Act to permit their class and collective actions. Why not? Presumably because this Court held decades ago that an identical collective action scheme (in fact, one borrowed from the FLSA) does *not* displace the Arbitration Act or prohibit individualized arbitration proceedings. *Gilmer* v. *Interstate/Johnson*

Lane Corp., 500 U. S. 20, 32 (1991) (discussing Age Discrimination in Employment Act). In fact, it turns out that "[e]very circuit to consider the question" has held that the FLSA allows agreements for individualized arbitration. *Alternative Entertainment*, 858 F. 3d, at 413 (opinion of Sutton, J.) (collecting cases). Faced with that obstacle, the employees are left to cast about elsewhere for help. And so they have cast in this direction, suggesting that one statute (the NLRA) steps in to dictate the procedures for claims under a different statute (the FLSA), and thereby overrides the commands of yet a third statute (the Arbitration Act). It's a sort of interpretive triple bank shot, and just stating the theory is enough to raise a judicial eyebrow.

Perhaps worse still, the employees' theory runs afoul of the usual rule that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). Union organization and collective bargaining in the workplace are the bread and butter of the NLRA, while the particulars of dispute resolution procedures in Article III courts or arbitration proceedings are usually left to other statutes and rules—not least the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA. It's more than a little doubtful that Congress would have tucked into the mousehole of Section 7's catchall term an elephant that tramples the work done by these other laws; flattens the parties' contracted-for dispute resolution procedures; and seats the Board as supreme superintendent of claims arising under a statute it doesn't even administer.

Nor does it help to fold yet another statute into the mix. At points, the employees suggest that the Norris-LaGuardia Act, a precursor of the NLRA, also renders their arbitration agreements unenforceable. But the

Norris-LaGuardia Act adds nothing here. It declares "[un]enforceable" contracts that conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §§102, 103. That is the same policy the NLRA advances and, as we've seen, it does not conflict with Congress's statutory directions favoring arbitration. See also *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970) (holding that the Norris-LaGuardia Act's anti-injunction provisions do not bar enforcement of arbitration agreements).

What all these textual and contextual clues indicate, our precedents confirm. In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected *every* such effort to date (save one temporary exception since overruled), with statutes ranging from the Sherman and Clayton Acts to the Age Discrimination in Employment Act, the Credit Repair Organizations Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and the Racketeer Influenced and Corrupt Organizations Act. *Italian Colors*, 570 U. S. 228; *Gilmer*, 500 U. S. 20; *CompuCredit Corp.* v. *Greenwood*, 565 U. S. 95 (2012); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477 (1989) (overruling *Wilko* v. *Swan*, 346 U. S. 427 (1953)); *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220 (1987). Throughout, we have made clear that even a statute's express provision for collective legal actions does not necessarily mean that it precludes "'individual attempts at conciliation'" through arbitration. *Gilmer*, *supra,* at 32. And we've stressed that the absence of any specific statutory discussion of arbitration or class actions is an important and telling clue that Congress has not displaced the Arbitration Act. *CompuCredit*, *supra,* at 103–104; *McMahon*, *supra,* at 227; *Italian Colors*, *supra,* at 234. Given so much precedent pointing so strongly in one direction, we do not see how we might faithfully turn the other way here.

Consider a few examples. In *Italian Colors*, this Court refused to find a conflict between the Arbitration Act and the Sherman Act because the Sherman Act (just like the NLRA) made “no mention of class actions” and was adopted before Rule 23 introduced its exception to the “usual rule” of “individual” dispute resolution. 570 U. S., at 234 (internal quotation marks omitted). In *Gilmer*, this Court “had no qualms in enforcing a class waiver in an arbitration agreement even though” the Age Discrimination in Employment Act “expressly permitted collective legal actions.” *Italian Colors*, *supra*, at 237 (citing *Gilmer*, *supra*, at 32). And in *CompuCredit*, this Court refused to find a conflict even though the Credit Repair Organizations Act expressly provided a “right to sue,” “repeated[ly]” used the words “action” and “court” and “class action,” and even declared “[a]ny waiver” of the rights it provided to be “void.” 565 U. S., at 99–100 (internal quotation marks omitted). If all the statutes in all those cases did not provide a congressional command sufficient to displace the Arbitration Act, we cannot imagine how we might hold that the NLRA alone and for the first time does so today.

The employees rejoin that our precedential story is complicated by some of this Court’s cases interpreting Section 7 itself. But, as it turns out, this Court’s Section 7 cases have usually involved just what you would expect from the statute’s plain language: efforts by employees related to organizing and collective bargaining in the workplace, not the treatment of class or collective actions in court or arbitration proceedings. See, *e.g., NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9 (1962) (walkout to protest workplace conditions); *NLRB* v. *Textile Workers*, 409 U. S. 213 (1972) (resignation from union and refusal to strike); *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251

(1975) (request for union representation at disciplinary interview). Neither do the two cases the employees cite prove otherwise. In *Eastex, Inc.* v. *NLRB*, 437 U. S. 556, 558 (1978), we simply addressed the question whether a union's distribution of a newsletter in the workplace qualified as a protected concerted activity. We held it did, noting that it was "undisputed that the union undertook the distribution in order to boost its support and improve its bargaining position in upcoming contract negotiations," all part of the union's "'continuing organizational efforts.'" *Id.,* at 575, and n. 24. In *NLRB* v. *City Disposal Systems, Inc.*, 465 U. S. 822, 831–832 (1984), we held only that an employee's assertion of a right under a collective bargaining agreement was protected, reasoning that the collective bargaining "process—beginning with the organization of the union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity." Nothing in our cases indicates that the NLRA guarantees class and collective action procedures, let alone for claims arising under different statutes and despite the express (and entirely unmentioned) teachings of the Arbitration Act.

That leaves the employees to try to make something of our dicta. The employees point to a line in *Eastex* observing that "it has been held" by other courts and the Board "that the 'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." 437 U. S.*,* at 565–566; see also Brief for National Labor Relations Board in No. 16–307, p. 15 (citing similar Board decisions). But even on its own terms, this dicta about the holdings of other bodies does not purport to discuss what *procedures* an employee might be entitled to in litigation or arbitration. Instead this passage at most suggests only that "resort to administrative and judicial forums" isn't "entirely unprotected." *Id.,* at 566. Indeed, the Court proceeded to explain that it did not intend to "address . . . the question of what may constitute 'concerted' activities in this [litigation] context." *Ibid.,* n. 15. So even the employees' dicta, when viewed fairly and fully, doesn't suggest that individualized dispute resolution procedures might be insufficient and collective procedures might be mandatory. Neither should this come as a surprise given that not a single one of the lower court or Board decisions *Eastex* discussed went so far as to hold that Section 7 guarantees a right to class or collective action procedures. As we've seen, the Board did not purport to discover that right until 2012, and no federal appellate court accepted it until 2016. See *D. R. Horton*, 357 N. L. R. B. 2277; 823 F. 3d 1147 (case below in No. 16–285).

With so much against them in the statute and our precedent, the employees end by seeking shelter in *Chevron*. Even if this Court doesn't see what they see in Section 7, the employees say we must rule for them anyway because of the deference this Court owes to an administrative agency's interpretation of the law. To be sure, the employees do not wish us to defer to the general counsel's judgment in 2010 that the NLRA and the Arbitration Act coexist peaceably; they wish us to defer instead to the Board's 2012 opinion suggesting the NLRA displaces the Arbitration Act. No party to these cases has asked us to reconsider *Chevron* deference. Cf. *SAS Institute Inc.* v. *Iancu*, *ante,* at 11. But even under *Chevron*'s terms, no deference is due. To show why, it suffices to outline just a few of the most obvious reasons.

The *Chevron* Court justified deference on the premise that a statutory ambiguity represents an "implicit" delegation to an agency to interpret a "statute which it administers." 467 U. S., at 841, 844. Here, though, the Board hasn't just sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. One of *Chevron*'s essential premises is simply missing here.

It's easy, too, to see why the "reconciliation" of distinct statutory regimes "is a matter for the courts," not agencies. *Gordon* v. *New York Stock Exchange, Inc.*, 422 U. S. 659, 685–686 (1975). An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own—effectively "'boot-strap[ping] itself into an area in which it has no jurisdiction.'" *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638, 650 (1990). All of which threatens to undo rather than honor legislative intentions. To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment. See *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U. S. 137, 144 (2002) (noting that this Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA").

Another justification the *Chevron* Court offered for deference is that "policy choices" should be left to Executive Branch officials "directly accountable to the people." 467 U. S., at 865. But here the Executive seems of two minds, for we have received competing briefs from the Board and from the United States (through the Solicitor General) disputing the meaning of the NLRA. And whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable. See Hemel & Nielson, *Chev-*

ron Step One-and-a-Half, 84 U. Chi. L. Rev. 757, 808 (2017) ("If the theory undergirding *Chevron* is that voters should be the judges of the executive branch's policy choices, then presumably the executive branch should have to take ownership of those policy choices so that voters know whom to blame (and to credit)"). In these circumstances, we will not defer.

Finally, the *Chevron* Court explained that deference is not due unless a "court, employing traditional tools of statutory construction," is left with an unresolved ambiguity. 467 U. S., at 843, n. 9. And that too is missing: the canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle. Where, as here, the canons supply an answer, "*Chevron* leaves the stage." *Alternative Entertainment*, 858 F. 3d, at 417 (opinion of Sutton, J.).

IV

The dissent sees things a little bit differently. In its view, today's decision ushers us back to the *Lochner* era when this Court regularly overrode legislative policy judgments. The dissent even suggests we have resurrected the long-dead "yellow dog" contract. *Post,* at 3–17, 30 (opinion of GINSBURG, J.). But like most apocalyptic warnings, this one proves a false alarm. Cf. L. Tribe, American Constitutional Law 435 (1978) ("'*Lochnerizing*' has become so much an epithet that the very use of the label may obscure attempts at understanding").

Our decision does nothing to override Congress's policy judgments. As the dissent recognizes, the legislative policy embodied in the NLRA is aimed at "safeguard[ing], first and foremost, workers' rights to join unions and to engage in collective bargaining." *Post,* at 8. Those rights stand every bit as strong today as they did yesterday. And rather than revive "yellow dog" contracts against union organizing that the NLRA outlawed back in 1935, today's decision merely declines to read into the NLRA a novel right to class action procedures that the Board's own general counsel disclaimed as recently as 2010.

Instead of overriding Congress's policy judgments, today's decision seeks to honor them. This much the dissent surely knows. Shortly after invoking the specter of *Lochner*, it turns around and criticizes the Court for trying *too hard* to abide the Arbitration Act's "'liberal federal policy favoring arbitration agreements,'" *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U. S. 79, 83 (2002), saying we "'ski'" too far down the "'slippery slope'" of this Court's arbitration precedent, *post,* at 23. But the dissent's real complaint lies with the mountain of precedent itself. The dissent spends page after page relitigating our Arbitration Act precedents, rehashing arguments this Court has heard and rejected many times in many cases that no party has asked us to revisit. Compare *post,* at 18–23, 26 (criticizing *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614 (1985), *Gilmer*, 500 U. S. 20, *Circuit City*, 532 U. S. 105, *Concepcion*, 563 U. S. 333, *Italian Colors*, 570 U. S. 228, and *CompuCredit*, 565 U. S. 95), with *Mitsubishi*, *supra,* at 645–650 (Stevens, J., dissenting), *Gilmer*, *supra,* at 36, 39–43 (Stevens, J., dissenting), *Circuit City*, *supra,* at 124–129 (Stevens, J., dissenting), *Concepcion*, *supra,* at 357–367 (BREYER, J., dissenting), *Italian Colors*, *supra,* at 240–253 (KAGAN, J., dissenting), and *CompuCredit*, *supra,* at 116–117 (GINSBURG, J., dissenting).

When at last it reaches the question of applying our precedent, the dissent offers little, and understandably so. Our precedent clearly teaches that a contract defense "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" is inconsistent with the Arbitration Act and its saving clause. *Concepcion*, *supra*, at 336 (opinion of the Court). And that, of course, is exactly what the employees' proffered defense seeks to do.

Nor is the dissent's reading of the NLRA any more available to us than its reading of the Arbitration Act. The dissent imposes a vast construction on Section 7's language. *Post,* at 9. But a statute's meaning does not always "turn solely" on the broadest imaginable "definitions of its component words." *Yates* v. *United States*, 574 U. S. ___, ___ (2015) (plurality opinion) (slip op., at 7). Linguistic and statutory context also matter. We have offered an extensive explanation why those clues support our reading today. By contrast, the dissent rests its interpretation on legislative history. *Post,* at 3–5; see also *post,* at 19–21. But legislative history is not the law. "It is the business of Congress to sum up its own debates in its legislation," and once it enacts a statute "'[w]e do not inquire what the legislature meant; we ask only what the statute means.'" *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U. S. 384, 396, 397 (1951) (Jackson, J., concurring) (quoting Justice Holmes). Besides, when it comes to the legislative history here, it seems Congress "did not discuss the right to file class or consolidated claims against employers." *D. R. Horton*, 737 F. 3d, at 361. So the dissent seeks instead to divine messages from congressional commentary directed to different questions altogether—a project that threatens to "substitute [the Court] for the Congress." *Schwegmann*, *supra*, at 396.

Nor do the problems end there. The dissent proceeds to argue that its expansive reading of the NLRA conflicts with and should prevail over the Arbitration Act. The NLRA leaves the Arbitration Act without force, the dissent says, because it provides the more "pinpointed" direction. *Post,* at 25. Even taken on its own terms, though, this argument quickly faces trouble. The dissent says the NLRA is the more specific provision because it supposedly "speaks directly to group action by employees," while the Arbitration Act doesn't speak to such actions. *Ibid.* But the question before us is whether courts must enforce particular arbitration agreements according to their terms. And it's the Arbitration Act that speaks directly to the enforceability of arbitration agreements, while the NLRA doesn't mention arbitration at all. So if forced to choose between the two, we might well say the Arbitration Act offers the more on-point instruction. Of course, there is no need to make that call because, as our precedents demand, we have sought and found a persuasive interpretation that gives effect to all of Congress's work, not just the parts we might prefer.

Ultimately, the dissent retreats to policy arguments. It argues that we should read a class and collective action right into the NLRA to promote the enforcement of wage and hour laws. *Post,* at 26–30. But it's altogether unclear why the dissent expects to find such a right in the NLRA rather than in statutes like the FLSA that actually regulate wages and hours. Or why we should read the NLRA as mandating the availability of class or collective actions when the FLSA expressly authorizes them yet allows parties to contract for bilateral arbitration instead. 29 U. S. C. §216(b); *Gilmer*, *supra,* at 32. While the dissent is no doubt right that class actions can enhance enforcement by "spread[ing] the costs of litigation," *post,* at 9, it's also well known that they can unfairly "plac[e] pressure on the defendant to settle even unmeritorious claims," *Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393, 445, n. 3 (2010) (GINSBURG, J., dissenting). The respective merits of class actions and private arbitration as means of enforcing the law are questions constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested. Just recently, for example, one federal agency banned individualized arbitration agreements it blamed for underenforcement of certain laws, only to see Congress respond by immediately repealing that rule. See 82 Fed. Reg. 33210 (2017) (cited *post,* at 28, n. 15); Pub. L. 115–74, 131 Stat. 1243. This Court is not free to substitute its preferred economic policies for those chosen by the people's representatives. *That*, we had always understood, was *Lochner*'s sin.

*

The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act. Because we can easily read Congress's statutes to work in harmony, that is where our duty lies. The judgments in *Epic*, No. 16–285, and *Ernst & Young*, No. 16–300, are reversed, and the cases are remanded for further proceedings consistent with this opinion. The judgment in *Murphy Oil*, No. 16–307, is affirmed.

So ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 16–285, 16–300, 16–307

EPIC SYSTEMS CORPORATION, PETITIONER
16–285 *v.*
JACOB LEWIS;

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ERNST & YOUNG LLP, ET AL., PETITIONERS
16–300 *v.*
STEPHEN MORRIS, ET AL.; AND

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER
16–307 *v.*
MURPHY OIL USA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May 21, 2018]

JUSTICE THOMAS, concurring.

I join the Court's opinion in full. I write separately to add that the employees also cannot prevail under the plain meaning of the Federal Arbitration Act. The Act declares arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2. As I have previously explained, grounds for revocation of a contract are those that concern "'the formation of the arbitration agreement.'" *American Express Co.* v. *Italian Colors*

Restaurant, 570 U. S. 228, 239 (2013) (concurring opinion) (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 353 (2011) (THOMAS, J., concurring)). The employees argue, among other things, that the class waivers in their arbitration agreements are unenforceable because the National Labor Relations Act makes those waivers illegal. But illegality is a public-policy defense. See Restatement (Second) of Contracts §§178–179 (1979); *McMullen* v. *Hoffman*, 174 U. S. 639, 669–670 (1899). Because "[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made," the saving clause does not apply here. *Concepcion*, *supra*, at 357. For this reason, and the reasons in the Court's opinion, the employees' arbitration agreements must be enforced according to their terms.

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[May 21, 2018]

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

The employees in these cases complain that their employers have underpaid them in violation of the wage and hours prescriptions of the Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. §201 *et seq.*, and analogous state laws. Individually, their claims are small, scarcely of a size warranting the expense of seeking redress alone. See Ruan, What's Left To Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage

Workers, 2012 Mich. St. L. Rev. 1103, 1118–1119 (Ruan). But by joining together with others similarly circumstanced, employees can gain effective redress for wage underpayment commonly experienced. See *id.,* at 1108–1111. To block such concerted action, their employers required them to sign, as a condition of employment, arbitration agreements banning collective judicial and arbitral proceedings of any kind. The question presented: Does the Federal Arbitration Act (Arbitration Act or FAA), 9 U. S. C. §1 *et seq.,* permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act (NLRA), 29 U. S. C. §151 *et seq.,* "to engage in . . . concerted activities" for their "mutual aid or protection"? §157. The answer should be a resounding "No."

In the NLRA and its forerunner, the Norris-LaGuardia Act (NLGA), 29 U. S. C. §101 *et seq.*, Congress acted on an acute awareness: For workers striving to gain from their employers decent terms and conditions of employment, there is strength in numbers. A single employee, Congress understood, is disarmed in dealing with an employer. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33–34 (1937). The Court today subordinates employee-protective labor legislation to the Arbitration Act. In so doing, the Court forgets the labor market imbalance that gave rise to the NLGA and the NLRA, and ignores the destructive consequences of diminishing the right of employees "to band together in confronting an employer." *NLRB* v. *City Disposal Systems, Inc.*, 465 U. S. 822, 835 (1984). Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order.

To explain why the Court's decision is egregiously wrong, I first refer to the extreme imbalance once prevalent in our Nation's workplaces, and Congress' aim in the

NLGA and the NLRA to place employers and employees on a more equal footing. I then explain why the Arbitration Act, sensibly read, does not shrink the NLRA's protective sphere.

I

It was once the dominant view of this Court that "[t]he right of a person to sell his labor upon such terms as he deems proper is . . . the same as the right of the purchaser of labor to prescribe [working] conditions." *Adair* v. *United States*, 208 U. S. 161, 174 (1908) (invalidating federal law prohibiting interstate railroad employers from discharging or discriminating against employees based on their membership in labor organizations); accord *Coppage* v. *Kansas*, 236 U. S. 1, 26 (1915) (invalidating state law prohibiting employers from requiring employees, as a condition of employment, to refrain or withdraw from union membership).

The NLGA and the NLRA operate on a different premise, that employees must have the capacity to act collectively in order to match their employers' clout in setting terms and conditions of employment. For decades, the Court's decisions have reflected that understanding. See *Jones & Laughlin Steel*, 301 U. S. 1 (upholding the NLRA against employer assault); cf. *United States* v. *Darby*, 312 U. S. 100 (1941) (upholding the FLSA).

A

The end of the 19th century and beginning of the 20th was a tumultuous era in the history of our Nation's labor relations. Under economic conditions then prevailing, workers often had to accept employment on whatever terms employers dictated. See 75 Cong. Rec. 4502 (1932). Aiming to secure better pay, shorter workdays, and safer workplaces, workers increasingly sought to band together to make their demands effective. See *ibid.*; H. Millis & E.

Brown, From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations 7–8 (1950).

Employers, in turn, engaged in a variety of tactics to hinder workers' efforts to act in concert for their mutual benefit. See J. Seidman, The Yellow Dog Contract 11 (1932). Notable among such devices was the "yellow-dog contract." Such agreements, which employers required employees to sign as a condition of employment, typically commanded employees to abstain from joining labor unions. See *id.,* at 11, 56. Many of the employer-designed agreements cast an even wider net, "proscrib[ing] all manner of concerted activities." Finkin, The Meaning and Contemporary Vitality of the Norris-LaGuardia Act, 93 Neb. L. Rev. 6, 16 (2014); see Seidman, *supra*, at 59–60, 65–66. As a prominent United States Senator observed, contracts of the yellow-dog genre rendered the "laboring man . . . absolutely helpless" by "waiv[ing] his right . . . to free association" and by requiring that he "singly present any grievance he has." 75 Cong. Rec. 4504 (remarks of Sen. Norris).

Early legislative efforts to protect workers' rights to band together were unavailing. See, *e.g., Coppage*, 236 U. S., at 26; Frankfurter & Greene, Legislation Affecting Labor Injunctions, 38 Yale L. J. 879, 889–890 (1929). Courts, including this one, invalidated the legislation based on then-ascendant notions about employers' and employees' constitutional right to "liberty of contract." See *Coppage*, 236 U. S., at 26; Frankfurter & Greene, *supra,* at 890–891. While stating that legislatures could curtail contractual "liberty" in the interest of public health, safety, and the general welfare, courts placed outside those bounds legislative action to redress the bargaining power imbalance workers faced. See *Coppage*, 236 U. S., at 16–19.

In the 1930's, legislative efforts to safeguard vulnerable workers found more receptive audiences. As the Great

Depression shifted political winds further in favor of worker-protective laws, Congress passed two statutes aimed at protecting employees' associational rights. First, in 1932, Congress passed the NLGA, which regulates the employer-employee relationship indirectly. Section 2 of the Act declares:

> "Whereas . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, . . . and that he shall be free from the interference, restraint, or coercion of employers . . . in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. §102.

Section 3 provides that federal courts shall not enforce "any . . . undertaking or promise in conflict with the public policy declared in [§2]." §103.[1] In adopting these provisions, Congress sought to render ineffective employer-imposed contracts proscribing employees' concerted activity of any and every kind. See 75 Cong. Rec. 4504–4505 (remarks of Sen. Norris) ("[o]ne of the objects" of the NLGA was to "outlaw" yellow-dog contracts); Finkin, *supra*, at 16 (contracts prohibiting "all manner of concerted activities apart from union membership or support . . . were understood to be 'yellow dog' contracts"). While banning court enforcement of contracts proscribing con-

[1] Other provisions of the NLGA further rein in federal-court authority to disturb employees' concerted activities. See, *e.g.,* 29 U. S. C. §104(d) (federal courts lack jurisdiction to enjoin a person from "aiding any person participating or interested in any labor dispute who is being proceeded against in, or [who] is prosecuting, any action or suit in any court of the United States or of any State").

certed action by employees, the NLGA did not directly prohibit coercive employer practices.

But Congress did so three years later, in 1935, when it enacted the NLRA. Relevant here, §7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*." 29 U. S. C. §157 (emphasis added). Section 8(a)(1) safeguards those rights by making it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§7]." §158(a)(1). To oversee the Act's guarantees, the Act established the National Labor Relations Board (Board or NLRB), an independent regulatory agency empowered to administer "labor policy for the Nation." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 242 (1959); see 29 U. S. C. §160.

Unlike earlier legislative efforts, the NLGA and the NLRA had staying power. When a case challenging the NLRA's constitutionality made its way here, the Court, in retreat from its *Lochner*-era contractual-"liberty" decisions, upheld the Act as a permissible exercise of legislative authority. See *Jones & Laughlin Steel*, 301 U. S., at 33–34. The Court recognized that employees have a "fundamental right" to join together to advance their common interests and that Congress, in lieu of "ignor[ing]" that right, had elected to "safeguard" it. *Ibid.*

B

Despite the NLRA's prohibitions, the employers in the cases now before the Court required their employees to sign contracts stipulating to submission of wage and hours claims to binding arbitration, and to do so only one-by-one.[2] When employees subsequently filed wage and hours claims in federal court and sought to invoke the collective-litigation procedures provided for in the FLSA and Federal Rules of Civil Procedure,[3] the employers moved to compel individual arbitration. The Arbitration Act, in their view, requires courts to enforce their take-it-or-leave-it arbitration agreements as written, including the collective-litigation abstinence demanded therein.

In resisting enforcement of the group-action foreclosures, the employees involved in this litigation do not urge

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[2] The Court's opinion opens with the question: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?" *Ante,* at 1. Were the "agreements" genuinely bilateral? Petitioner Epic Systems Corporation e-mailed its employees an arbitration agreement requiring resolution of wage and hours claims by individual arbitration. The agreement provided that if the employees "continue[d] to work at Epic," they would "be deemed to have accepted th[e] Agreement." App. to Pet. for Cert. in No. 16–285, p. 30a. Ernst & Young similarly e-mailed its employees an arbitration agreement, which stated that the employees' continued employment would indicate their assent to the agreement's terms. See App. in No. 16–300, p. 37. Epic's and Ernst & Young's employees thus faced a Hobson's choice: accept arbitration on their employer's terms or give up their jobs.

[3] The FLSA establishes an opt-in collective-litigation procedure for employees seeking to recover unpaid wages and overtime pay. See 29 U. S. C. §216(b). In particular, it authorizes "one or more employees" to maintain an action "in behalf of himself or themselves and other employees similarly situated." *Ibid.* "Similarly situated" employees may become parties to an FLSA collective action (and may share in the recovery) only if they file written notices of consent to be joined as parties. *Ibid.* The Federal Rules of Civil Procedure provide two collective-litigation procedures relevant here. First, Rule 20(a) permits individuals to join as plaintiffs in a single action if they assert claims arising out of the same transaction or occurrence and their claims involve common questions of law or fact. Second, Rule 23 establishes an opt-out class-action procedure, pursuant to which "[o]ne or more members of a class" may bring an action on behalf of the entire class if specified prerequisites are met.

that they must have access to a judicial forum.[4] They argue only that the NLRA prohibits their employers from denying them the right to pursue work-related claims in concert in any forum. If they may be stopped by employer-dictated terms from pursuing collective procedures in court, they maintain, they must at least have access to similar procedures in an arbitral forum.

C

Although the NLRA safeguards, first and foremost, workers' rights to join unions and to engage in collective bargaining, the statute speaks more embracively. In addition to protecting employees' rights "to form, join, or assist labor organizations" and "to bargain collectively through representatives of their own choosing," the Act protects employees' rights "to engage in *other* concerted activities for the purpose of . . . mutual aid or protection." 29 U. S. C. §157 (emphasis added); see, *e.g., NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9, 14–15 (1962) (§7 protected unorganized employees when they walked off the job to protest cold working conditions). See also 1 J. Higgins, The Developing Labor Law 209 (6th ed. 2012) ("Section 7 protects not only union-related activity but also 'other concerted activities . . . for mutual aid or protection.'"); 1 N. Lareau, Labor and Employment Law §1.01[1], p. 1–2 (2017) ("Section 7 extended to employees three federally protected rights: (1) the right to form and join unions; (2) the right to bargain collectively (negotiate) with employers about terms and conditions of employment; *and* (3) the right to work in concert with another employee or employees to achieve employment-related goals." (emphasis added)).

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[4] Notably, one employer specified that if the provisions confining employees to individual proceedings are "unenforceable," "any claim brought on a class, collective, or representative action basis must be filed in . . . court." App. to Pet. for Cert. in No. 16–285, at 35a.

Suits to enforce workplace rights collectively fit comfortably under the umbrella "concerted activities for the purpose of . . . mutual aid or protection." 29 U. S. C. §157. "Concerted" means "[p]lanned or accomplished together; combined." American Heritage Dictionary 381 (5th ed. 2011). "Mutual" means "reciprocal." *Id.,* at 1163. When employees meet the requirements for litigation of shared legal claims in joint, collective, and class proceedings, the litigation of their claims is undoubtedly "accomplished together." By joining hands in litigation, workers can spread the costs of litigation and reduce the risk of employer retaliation. See *infra,* at 27–28.

Recognizing employees' right to engage in collective employment litigation and shielding that right from employer blockage are firmly rooted in the NLRA's design. Congress expressed its intent, when it enacted the NLRA, to "protec[t] the exercise by workers of full freedom of association," thereby remedying "[t]he inequality of bargaining power" workers faced. 29 U. S. C. §151; see, *e.g., Eastex, Inc.* v. *NLRB*, 437 U. S. 556, 567 (1978) (the Act's policy is "to protect the right of workers to act together to better their working conditions" (internal quotation marks omitted)); *City Disposal*, 465 U. S., at 835 ("[I]n enacting §7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."). See also *supra,* at 5–6. There can be no serious doubt that collective litigation is one way workers may associate with one another to improve their lot.

Since the Act's earliest days, the Board and federal courts have understood §7's "concerted activities" clause to protect myriad ways in which employees may join together to advance their shared interests. For example, the Board and federal courts have affirmed that the Act shields employees from employer interference when they participate in concerted appeals to the media, *e.g., NLRB* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503, 505–506 (CA2 1942), legislative bodies, *e.g., Bethlehem Shipbuilding Corp.* v. *NLRB*, 114 F. 2d 930, 937 (CA1 1940), and government agencies, *e.g., Moss Planing Mill Co.*, 103 N. L. R. B. 414, 418–419, enf'd, 206 F. 2d 557 (CA4 1953). "The 74th Congress," this Court has noted, "knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context." *Eastex*, 437 U. S., at 565.

Crucially important here, for over 75 years, the Board has held that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment. See, *e.g., Spandsco Oil and Royalty Co.*, 42 N. L. R. B. 942, 948–949 (1942) (three employees' joint filing of FLSA suit ranked as concerted activity protected by the NLRA); *Poultrymen's Service Corp.*, 41 N. L. R. B. 444, 460–463, and n. 28 (1942) (same with respect to employee's filing of FLSA suit on behalf of himself and others similarly situated), enf'd, 138 F. 2d 204 (CA3 1943); *Sarkes Tarzian, Inc.*, 149 N. L. R. B. 147, 149, 153 (1964) (same with respect to employees' filing class libel suit); *United Parcel Service, Inc.*, 252 N. L. R. B. 1015, 1018 (1980) (same with respect to employee's filing class action regarding break times), enf'd, 677 F. 2d 421 (CA6 1982); *Harco Trucking, LLC*, 344 N. L. R. B. 478, 478–479 (2005) (same with respect to employee's maintaining class action regarding wages). For decades, federal courts have endorsed the Board's view, comprehending that "the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by §7." *Leviton Mfg. Co.* v. *NLRB*, 486 F. 2d 686, 689 (CA1 1973); see, *e.g., Brady* v. *National Football League*, 644 F. 3d 661, 673

(CA8 2011) (similar).[5] The Court pays scant heed to this longstanding line of decisions.[6]

D

In face of the NLRA's text, history, purposes, and longstanding construction, the Court nevertheless concludes that collective proceedings do not fall within the scope of §7. None of the Court's reasons for diminishing §7 should carry the day.

1

The Court relies principally on the *ejusdem generis* canon. See *ante,* at 12. Observing that §7's "other concerted activities" clause "appears at the end of a detailed list of activities," the Court says the clause should be read

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[5] The Court cites, as purported evidence of contrary agency precedent, a 2010 "Guideline Memorandum" that the NLRB's then-General Counsel issued to his staff. See *ante,* at 4, 19, 22. The General Counsel appeared to conclude that employees have a §7 right to file collective suits, but that employers can nonetheless require employees to sign arbitration agreements waiving the right to maintain such suits. See Memorandum GC 10–06, p. 7 (June 16, 2010). The memorandum sought to address what the General Counsel viewed as tension between longstanding precedent recognizing a §7 right to pursue collective employment litigation and more recent court decisions broadly construing the FAA. The memorandum did not bind the Board, and the Board never adopted the memorandum's position as its own. See *D. R. Horton*, 357 N. L. R. B. 2277, 2282 (2012), enf. denied in relevant part, 737 F. 3d 344 (CA5 2013); Tr. of Oral Arg. 41. Indeed, shortly after the General Counsel issued the memorandum, the Board rejected its analysis, finding that it conflicted with Board precedent, rested on erroneous factual premises, "defie[d] logic," and was internally incoherent. *D. R. Horton*, 357 N. L. R. B., at 2282–2283.

[6] In 2012, the Board held that employer-imposed contracts barring group litigation in any forum—arbitral or judicial—are unlawful. *D. R. Horton*, 357 N. L. R. B. 2277. In so ruling, the Board simply applied its precedents recognizing that (1) employees have a §7 right to engage in collective employment litigation and (2) employers cannot lawfully require employees to sign away their §7 rights. See *id.,* at 2278, 2280. It broke no new ground. But cf. *ante,* at 2, 19.

to "embrace" only activities "similar in nature" to those set forth first in the list, *ibid.* (internal quotation marks omitted), *i.e.,* "'self-organization,' 'form[ing], join[ing], or assist[ing] labor organizations,' and 'bargain[ing] collectively,'" *ibid.* The Court concludes that §7 should, therefore, be read to protect "things employees 'just do' for themselves." *Ibid.* (quoting *NLRB* v. *Alternative Entertainment, Inc.*, 858 F. 3d 393, 415 (CA6 2017) (Sutton, J., concurring in part and dissenting in part); emphasis deleted). It is far from apparent why joining hands in litigation would not qualify as "things employees just do for themselves." In any event, there is no sound reason to employ the *ejusdem generis* canon to narrow §7's protections in the manner the Court suggests.

The *ejusdem generis* canon may serve as a useful guide where it is doubtful Congress intended statutory words or phrases to have the broad scope their ordinary meaning conveys. See *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, 519 (1923). Courts must take care, however, not to deploy the canon to undermine Congress' efforts to draft encompassing legislation. See *United States* v. *Powell*, 423 U. S. 87, 90 (1975) ("[W]e would be justified in narrowing the statute only if such a narrow reading was supported by evidence of congressional intent over and above the language of the statute."). Nothing suggests that Congress envisioned a cramped construction of the NLRA. Quite the opposite, Congress expressed an embracive purpose in enacting the legislation, *i.e.,* to "protec[t] the exercise by workers of full freedom of association." 29 U. S. C. §151; see *supra,* at 9.

2

In search of a statutory hook to support its application of the *ejusdem generis* canon, the Court turns to the NLRA's "structure." *Ante,* at 12. Citing a handful of provisions that touch upon unionization, collective bargaining, picketing, and strikes, the Court asserts that the NLRA "establish[es] a regulatory regime" governing each of the activities protected by §7. *Ante,* at 12–13. That regime, the Court says, offers "specific guidance" and "rules" regulating each protected activity. *Ante,* at 13. Observing that none of the NLRA's provisions explicitly regulates employees' resort to collective litigation, the Court insists that "it is hard to fathom why Congress would take such care to regulate all the other matters mentioned in [§7] yet remain mute about this matter alone—unless, of course, [§7] doesn't speak to class and collective action procedures in the first place." *Ibid.*

This argument is conspicuously flawed. When Congress enacted the NLRA in 1935, the only §7 activity Congress addressed with any specificity was employees' selection of collective-bargaining representatives. See 49 Stat. 453. The Act did not offer "specific guidance" about employees' rights to "form, join, or assist labor organizations." Nor did it set forth "specific guidance" for any activity falling within §7's "other concerted activities" clause. The only provision that touched upon an activity falling within that clause stated: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." *Id.,* at 457. That provision hardly offered "specific guidance" regarding employees' right to strike.

Without much in the original Act to support its "structure" argument, the Court cites several provisions that Congress added later, in response to particular concerns. Compare 49 Stat. 449–457 with 61 Stat. 142–143 (1947) (adding §8(d) to provide guidance regarding employees' and employers' collective-bargaining obligations); 61 Stat. 141–142 (amending §8(a) and adding §8(b) to proscribe specified labor organization practices); 73 Stat. 544 (1959) (adding §8(b)(7) to place restrictions on labor organizations' right to picket employers). It is difficult to comprehend why Congress' later inclusion of specific guidance regarding some of the activities protected by §7 sheds any light on Congress' initial conception of §7's scope.

But even if each of the provisions the Court cites had been included in the original Act, they still would provide little support for the Court's conclusion. For going on 80 years now, the Board and federal courts—including this one—have understood §7 to protect numerous activities for which the Act provides no "specific" regulatory guidance. See *supra,* at 9–10.

3

In a related argument, the Court maintains that the NLRA does not "even whispe[r]" about the "rules [that] should govern the adjudication of class or collective actions in court or arbitration." *Ante,* at 13. The employees here involved, of course, do not look to the NLRA for the procedures enabling them to vindicate their employment rights in arbitral or judicial forums. They assert that the Act establishes their right to act in concert using existing, generally available procedures, see *supra,* at 7, n. 3, and to do so free from employer interference. The FLSA and the Federal Rules on joinder and class actions provide the procedures pursuant to which the employees may ally to pursue shared legal claims. Their employers cannot lawfully cut off their access to those procedures, they urge, without according them access to similar procedures in arbitral forums. See, *e.g.,* American Arbitration Assn., Supplementary Rules for Class Arbitrations (2011).

To the employees' argument, the Court replies: If the employees "really take existing class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them in favor of individualized arbitration procedures." *Ante,* at 14. The freedom to depart asserted by the Court, as already underscored, is entirely one sided.

See *supra,* at 2–5. Once again, the Court ignores the reality that sparked the NLRA's passage: Forced to face their employers without company, employees ordinarily are no match for the enterprise that hires them. Employees gain strength, however, if they can deal with their employers in numbers. That is the very reason why the NLRA secures against employer interference employees' right to act in concert for their "mutual aid or protection." 29 U. S. C. §§151, 157, 158.

4

Further attempting to sow doubt about §7's scope, the Court asserts that class and collective procedures were "hardly known when the NLRA was adopted in 1935." *Ante,* at 11. In particular, the Court notes, the FLSA's collective-litigation procedure postdated §7 "by years" and Rule 23 "didn't create the modern class action until 1966." *Ibid.*

First, one may ask, is there any reason to suppose that Congress intended to protect employees' right to act in concert using only those procedures and forums available in 1935? Congress framed §7 in broad terms, "entrust[ing]" the Board with "responsibility to adapt the Act to changing patterns of industrial life." *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 266 (1975); see *Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U. S. 206, 212 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." (internal quotation marks omitted)). With fidelity to Congress' aim, the Board and federal courts have recognized that the NLRA shields employees from employer interference when they, *e.g.,* join together to file complaints with administrative agencies, even if those agencies did not exist in 1935. See, *e.g., Wray Electric Contracting, Inc.,* 210 N. L. R. B. 757, 762 (1974) (the NLRA protects concerted filing of complaint with the Occupational Safety and Health Administration).

Moreover, the Court paints an ahistorical picture. As Judge Wood, writing for the Seventh Circuit, cogently explained, the FLSA's collective-litigation procedure and the modern class action were "not written on a clean slate." 823 F. 3d 1147, 1154 (2016). By 1935, permissive joinder was scarcely uncommon in courts of equity. See 7 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1651 (3d ed. 2001). Nor were representative and class suits novelties. Indeed, their origins trace back to medieval times. See S. Yeazell, From Medieval Group Litigation to the Modern Class Action 38 (1987). And beyond question, "[c]lass suits long have been a part of American jurisprudence." 7A Wright, *supra*, §1751, at 12 (3d ed. 2005); see *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U. S. 356, 363 (1921). See also Brief for Constitutional Accountability Center as *Amicus Curiae* 5–16 (describing group litigation's "rich history"). Early instances of joint proceedings include cases in which employees allied to sue an employer. *E.g., Gorley* v. *Louisville*, 23 Ky. 1782, 65 S. W. 844 (1901) (suit to recover wages brought by ten members of city police force on behalf of themselves and other officers); *Guiliano* v. *Daniel O'Connell's Sons*, 105 Conn. 695, 136 A. 677 (1927) (suit by two employees to recover for injuries sustained while residing in housing provided by their employer). It takes no imagination, then, to comprehend that Congress, when it enacted the NLRA, likely meant to protect employees' joining together to engage in collective litigation.[7]

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[7] The Court additionally suggests that something must be amiss because the employees turn to the NLRA, rather than the FLSA, to resist enforcement of the collective-litigation waivers. See *ante,* at 14–15. But the employees' reliance on the NLRA is hardly a reason to "raise a judicial eyebrow." *Ante,* at 15. The NLRA's guiding purpose is to protect employees' rights to work together when addressing shared

E

Because I would hold that employees' §7 rights include the right to pursue collective litigation regarding their wages and hours, I would further hold that the employer-dictated collective-litigation stoppers, *i.e.,* "waivers," are unlawful. As earlier recounted, see *supra,* at 6, §8(a)(1) makes it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce" employees in the exercise of their §7 rights. 29 U. S. C. §158(a)(1). Beyond genuine dispute, an employer "interfere[s] with" and "restrain[s]" employees in the exercise of their §7 rights by mandating that they prospectively renounce those rights in individual employment agreements.[8] The law could hardly be otherwise: Employees' rights to band together to meet their employers' superior strength would be worth precious little if employers could condition employment on workers signing away those rights. See *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 364 (1940). Properly assessed, then, the "waivers" rank as unfair labor practices outlawed by the NLRA, and therefore unenforceable in court. See *Kaiser Steel Corp.* v. *Mullins*, 455 U. S. 72, 77 (1982) ("[O]ur cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law.").[9]

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workplace grievances of whatever kind.

[8] See, *e.g., Bethany Medical Center*, 328 N. L. R. B. 1094, 1105–1106 (1999) (holding employer violated §8(a)(1) by conditioning employees' rehiring on the surrender of their right to engage in future walkouts); *Mandel Security Bureau Inc.*, 202 N. L. R. B. 117, 119, 122 (1973) (holding employer violated §8(a)(1) by conditioning employee's reinstatement to former position on agreement that employee would refrain from filing charges with the Board and from circulating work-related petitions, and, instead, would "mind his own business").

[9] I would similarly hold that the NLGA renders the collective-litigation waivers unenforceable. That Act declares it the public policy of the United States that workers "shall be free from the interference, restraint, or coercion of employers" when they engage in "concerted

II

Today's decision rests largely on the Court's finding in the Arbitration Act "emphatic directions" to enforce arbitration agreements according to their terms, including collective-litigation prohibitions. *Ante,* at 6. Nothing in the FAA or this Court's case law, however, requires subordination of the NLRA's protections. Before addressing the

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activities" for their "mutual aid or protection." 29 U. S. C. §102; see *supra,* at 5. Section 3 provides that federal courts shall not enforce any "promise in conflict with the [Act's] policy." §103. Because employer-extracted collective-litigation waivers interfere with employees' ability to engage in "concerted activities" for their "mutual aid or protection," see *supra,* at 8–11, the arm-twisted waivers collide with the NLGA's stated policy; thus, no federal court should enforce them. See Finkin, The Meaning and Contemporary Vitality of the Norris-LaGuardia Act, 93 Neb. L. Rev. 6 (2014).

Boys Markets, Inc. v. *Retail Clerks*, 398 U. S. 235 (1970), provides no support for the Court's contrary conclusion. See *ante*, at 16. In *Boys Markets*, an employer and a union had entered into a collective-bargaining agreement, which provided that labor disputes would be resolved through arbitration and that the union would not engage in strikes, pickets, or boycotts during the life of the agreement. 398 U. S., at 238–239. When a dispute later arose, the union bypassed arbitration and called a strike. *Id.,* at 239. The question presented: Whether a federal district court could enjoin the strike and order the parties to arbitrate their dispute. The case required the Court to reconcile the NLGA's limitations on federal courts' authority to enjoin employees' concerted activities, see 29 U. S. C. §104, with §301(a) of the Labor Management Relations Act, 1947, which grants federal courts the power to enforce collective-bargaining agreements, see 29 U. S. C. §185(a). The Court concluded that permitting district courts to enforce no-strike and arbitration provisions in collective-bargaining agreements would encourage employers to enter into such agreements, thereby furthering federal labor policy. 398 U. S., at 252–253. That case has little relevance here. It did not consider the enforceability of arbitration provisions that require employees to arbitrate disputes only one-by-one. Nor did it consider the enforceability of arbitration provisions that an employer has unilaterally imposed on employees, as opposed to provisions negotiated through collective-bargaining processes in which employees can leverage their collective strength.

interaction between the two laws, I briefly recall the FAA's history and the domain for which that Act was designed.

A

1

Prior to 1925, American courts routinely declined to order specific performance of arbitration agreements. See Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 270 (1926). Growing backlogs in the courts, which delayed the resolution of commercial disputes, prompted the business community to seek legislation enabling merchants to enter into binding arbitration agreements. See *id.,* at 265. The business community's aim was to secure to merchants an expeditious, economical means of resolving their disputes. See *ibid.* The American Bar Association's Committee on Commerce, Trade and Commercial Law took up the reins in 1921, drafting the legislation Congress enacted, with relatively few changes, four years later. See Committee on Commerce, Trade & Commercial Law, The United States Arbitration Law and Its Application, 11 A. B. A. J. 153 (1925).

The legislative hearings and debate leading up to the FAA's passage evidence Congress' aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes. See, *e.g.,* 65 Cong. Rec. 11080 (1924) (remarks of Rep. Mills) ("This bill provides that where there are commercial contracts and there is disagreement under the contract, the court can [en]force an arbitration agreement in the same way as other portions of the contract."); Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess. (1924) (Joint Hearings) (consistently focusing on the need for binding arbitration of commercial disputes).[10]

[10] American Bar Association member Julius H. Cohen, credited with

The FAA's legislative history also shows that Congress did not intend the statute to apply to arbitration provisions in employment contracts. In brief, when the legislation was introduced, organized labor voiced concern. See Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923) (Hearing). Herbert Hoover, then Secretary of Commerce, suggested that if there were "objection[s]" to including "workers' contracts in the law's scheme," Congress could amend the legislation to say: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce." *Id.,* at 14. Congress adopted Secretary Hoover's suggestion virtually verbatim in §1 of the Act, see Joint Hearings 2; 9 U. S. C. §1, and labor expressed no further opposition, see H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).[11]

Congress, it bears repetition, envisioned application of the Arbitration Act to voluntary, negotiated agreements. See, *e.g.,* 65 Cong. Rec. 1931 (remarks of Rep. Graham) (the FAA provides an "opportunity to enforce . . . an agreement to arbitrate, when voluntarily placed in the

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drafting the legislation, wrote shortly after the FAA's passage that the law was designed to provide a means of dispute resolution "particularly adapted to the settlement of commercial disputes." Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 279 (1926). Arbitration, he and a colleague explained, is "peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like." *Id.,* at 281. "It has a place also," they noted, "in the determination of the simpler questions of law" that "arise out of th[e] daily relations between merchants, [for example,] the passage of title, [and] the existence of warranties." *Ibid.*

[11] For fuller discussion of Congress' intent to exclude employment contracts from the FAA's scope, see *Circuit City Stores, Inc.* v. *Adams*, 532 U. S. 105, 124–129 (2001) (Stevens, J., dissenting).

document by the parties to it"). Congress never endorsed a policy favoring arbitration where one party sets the terms of an agreement while the other is left to "take it or leave it." Hearing 9 (remarks of Sen. Walsh) (internal quotation marks omitted); see *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 403, n. 9 (1967) ("We note that categories of contracts otherwise within the Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See §1.").

2

In recent decades, this Court has veered away from Congress' intent simply to afford merchants a speedy and economical means of resolving commercial disputes. See Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L. Q. 637, 644–674 (1996) (tracing the Court's evolving interpretation of the FAA's scope). In 1983, the Court declared, for the first time in the FAA's then 58-year history, that the FAA evinces a "liberal federal policy favoring arbitration." *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24 (1983) (involving an arbitration agreement between a hospital and a construction contractor). Soon thereafter, the Court ruled, in a series of cases, that the FAA requires enforcement of agreements to arbitrate not only contract claims, but statutory claims as well. *E.g., Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614 (1985); *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220 (1987). Further, in 1991, the Court concluded in *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 23 (1991), that the FAA requires enforcement of agreements to arbitrate claims arising under the Age Discrimination in Employment Act of 1967, a workplace antidiscrimination statute. Then, in 2001, the Court ruled in *Circuit City*

Stores, Inc. v. *Adams*, 532 U. S. 105, 109 (2001), that the Arbitration Act's exemption for employment contracts should be construed narrowly, to exclude from the Act's scope only transportation workers' contracts.

Employers have availed themselves of the opportunity opened by court decisions expansively interpreting the Arbitration Act. Few employers imposed arbitration agreements on their employees in the early 1990's. After *Gilmer* and *Circuit City*, however, employers' exaction of arbitration clauses in employment contracts grew steadily. See, *e.g.,* Economic Policy Institute (EPI), A. Colvin, The Growing Use of Mandatory Arbitration 1–2, 4 (Sept. 27, 2017), available at https://www.epi.org/files/pdf/135056.pdf (All Internet materials as visited May 18, 2018) (data indicate only 2.1% of nonunionized companies imposed mandatory arbitration agreements on their employees in 1992, but 53.9% do today). Moreover, in response to subsequent decisions addressing class arbitration,[12] employers have increasingly included in their arbitration agreements express group-action waivers. See Ruan 1129;

[12] In *Green Tree Financial Corp.* v. *Bazzle*, 539 U. S. 444 (2003), a plurality suggested arbitration might proceed on a class basis where not expressly precluded by an agreement. After *Bazzle*, companies increasingly placed explicit collective-litigation waivers in consumer and employee arbitration agreements. See Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev. 373, 409–410 (2005). In *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011), and *American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228 (2013), the Court held enforceable class-action waivers in the arbitration agreements at issue in those cases. No surprise, the number of companies incorporating express class-action waivers in consumer and employee arbitration agreements spiked. See 2017 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation 29 (2017), available at https://www.classactionsurvey.com/pdf/2017-class-action-survey.pdf (reporting that 16.1% of surveyed companies' arbitration agreements expressly precluded class actions in 2012, but 30.2% did so in 2016).

Colvin, *supra*, at 6 (estimating that 23.1% of nonunionized employees are now subject to express class-action waivers in mandatory arbitration agreements). It is, therefore, this Court's exorbitant application of the FAA—stretching it far beyond contractual disputes between merchants—that led the NLRB to confront, for the first time in 2012, the precise question whether employers can use arbitration agreements to insulate themselves from collective employment litigation. See *D. R. Horton*, 357 N. L. R. B. 2277 (2012), enf. denied in relevant part, 737 F. 3d 344 (CA5 2013). Compare *ante,* at 3–4 (suggesting the Board broke new ground in 2012 when it concluded that the NLRA prohibits employer-imposed arbitration agreements that mandate individual arbitration) with *supra,* at 10–11 (NLRB decisions recognizing a §7 right to engage in collective employment litigation), and *supra,* at 17, n. 8 (NLRB decisions finding employer-dictated waivers of §7 rights unlawful).

As I see it, in relatively recent years, the Court's Arbitration Act decisions have taken many wrong turns. Yet, even accepting the Court's decisions as they are, nothing compels the destructive result the Court reaches today. Cf. R. Bork, The Tempting of America 169 (1990) ("Judges . . . live on the slippery slope of analogies; they are not supposed to ski it to the bottom.").

B

Through the Arbitration Act, Congress sought "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint*, 388 U. S., at 404, n. 12. Congress thus provided in §2 of the FAA that the terms of a written arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U. S. C. §2 (emphasis added). Pursuant to this "saving clause," arbitration agreements and terms may be invalidated based on "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Associates, Inc.* v. *Casarotto*, 517 U. S. 681, 687 (1996); see *ante,* at 7.

Illegality is a traditional, generally applicable contract defense. See 5 R. Lord, Williston on Contracts §12.1 (4th ed. 2009). "[A]uthorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract." *Kaiser Steel*, 455 U. S., at 77 (quoting *McMullen* v. *Hoffman*, 174 U. S. 639, 654 (1899)). For the reasons stated *supra,* at 8–17, I would hold that the arbitration agreements' employer-dictated collective-litigation waivers are unlawful. By declining to enforce those adhesive waivers, courts would place them on the same footing as any other contract provision incompatible with controlling federal law. The FAA's saving clause can thus achieve harmonization of the FAA and the NLRA without undermining federal labor policy.

The Court urges that our case law—most forcibly, *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333 (2011)—rules out reconciliation of the NLRA and the FAA through the latter's saving clause. See *ante,* at 6–9. I disagree. True, the Court's Arbitration Act decisions establish that the saving clause "offers no refuge" for defenses that discriminate against arbitration, "either by name or by more subtle methods." *Ante,* at 7. The Court, therefore, has rejected saving clause salvage where state courts have invoked generally applicable contract defenses to discriminate "covertly" against arbitration. *Kindred Nursing Centers L. P.* v. *Clark*, 581 U. S. ___, ___ (2017) (slip op., at 5). In *Concepcion*, the Court held that the saving clause did not spare the California Supreme Court's invocation of unconscionability doctrine to establish a rule blocking enforcement of class-action waivers in adhesive consumer contracts. 563 U. S., at 341–344, 346–352. Class proceedings, the Court said, would "sacrific[e] the principal advantage of arbitration—its informality—and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.,* at 348. Accordingly, the Court concluded, the California Supreme Court's rule, though derived from unconscionability doctrine, impermissibly disfavored arbitration, and therefore could not stand. *Id.,* at 346–352.

Here, however, the Court is not asked to apply a generally applicable contract defense to generate a rule discriminating against arbitration. At issue is application of the ordinarily superseding rule that "illegal promises will not be enforced," *Kaiser Steel*, 455 U. S., at 77, to invalidate arbitration provisions at odds with the NLRA, a pathmarking federal statute. That statute neither discriminates against arbitration on its face, nor by covert operation. It requires invalidation of *all* employer-imposed contractual provisions prospectively waiving employees' §7 rights. See *supra,* at 17, and n. 8; cf. *Kindred Nursing Centers*, 581 U. S., at ___, n. 2 (slip op., at 7, n. 2) (States may enforce generally applicable rules so long as they do not "single out arbitration" for disfavored treatment).

C

Even assuming that the FAA and the NLRA were inharmonious, the NLRA should control. Enacted later in time, the NLRA should qualify as "an implied repeal" of the FAA, to the extent of any genuine conflict. See *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936). Moreover, the NLRA should prevail as the more pinpointed, subject-matter specific legislation, given that it speaks directly to group action by employees to improve the terms and conditions of their employment. See *Radzanower* v. *Touche Ross & Co.*, 426 U. S. 148, 153 (1976) ("a specific statute" generally "will not be controlled or nullified by a general one" (internal quotation marks omitted)).[13]

Citing statutory examples, the Court asserts that when Congress wants to override the FAA, it does so expressly. See *ante,* at 13–14. The statutes the Court cites, however, are of recent vintage.[14] Each was enacted during the time this Court's decisions increasingly alerted Congress that it would be wise to leave not the slightest room for doubt if it wants to secure access to a judicial forum or to provide a green light for group litigation before an arbitrator or court. See *CompuCredit Corp.* v. *Greenwood*, 565 U. S. 95, 116 (2012) (GINSBURG, J., dissenting). The Congress that drafted the NLRA in 1935 was scarcely on similar alert.

III

The inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers. See generally Sternlight, Disarming Employees: How American Employers Are Using Mandatory Arbitration To Deprive Workers of Legal Protections, 80 Brooklyn L. Rev. 1309 (2015).

The probable impact on wage and hours claims of the kind asserted in the cases now before the Court is all too evident. Violations of minimum-wage and overtime laws are widespread. See Ruan 1109–1111; A. Bernhardt et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities 11–16, 21–22 (2009). One study estimated that in Chicago, Los

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[13] Enacted, as was the NLRA, after passage of the FAA, the NLGA also qualifies as a statute more specific than the FAA. Indeed, the NLGA expressly addresses the enforceability of contract provisions that interfere with employees' ability to engage in concerted activities. See *supra,* at 17, n. 9. Moreover, the NLGA contains an express repeal provision, which provides that "[a]ll acts and parts of acts in conflict with [the Act's] provisions . . . are repealed." 29 U. S. C. §115.

[14] See 116 Stat. 1836 (2002); 120 Stat. 2267 (2006); 124 Stat. 1746 (2010); 124 Stat. 2035 (2010).

Angeles, and New York City alone, low-wage workers lose nearly $3 billion in legally owed wages each year. *Id*., at 6. The U. S. Department of Labor, state labor departments, and state attorneys general can uncover and obtain recoveries for some violations. See EPI, B. Meixell & R. Eisenbrey, An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year 2 (2014), available at https://www.epi.org/files/2014/wage-theft.pdf. Because of their limited resources, however, government agencies must rely on private parties to take a lead role in enforcing wage and hours laws. See Brief for State of Maryland et al. as *Amici Curiae* 29–33; Glover, The Structural Role of Private Enforcement Mechanisms in Public Law, 53 Wm. & Mary L. Rev. 1137, 1150–1151 (2012) (Department of Labor investigates fewer than 1% of FLSA-covered employers each year).

If employers can stave off collective employment litigation aimed at obtaining redress for wage and hours infractions, the enforcement gap is almost certain to widen. Expenses entailed in mounting individual claims will often far outweigh potential recoveries. See *id*., at 1184–1185 (because "the FLSA systematically tends to generate low-value claims," "mechanisms that facilitate the economics of claiming are required"); *Sutherland* v. *Ernst & Young LLP*, 768 F. Supp. 2d 547, 552 (SDNY 2011) (finding that an employee utilizing Ernst & Young's arbitration program would likely have to spend $200,000 to recover only $1,867.02 in overtime pay and an equivalent amount in liquidated damages); cf. Resnik, Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, 124 Yale L. J. 2804, 2904 (2015) (analyzing available data from the consumer context to conclude that "private enforcement of small-value claims depends on collective, rather than individual, action"); *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 617 (1997) (class actions help "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights" (internal quotation marks omitted)).[15]

Fear of retaliation may also deter potential claimants from seeking redress alone. See, *e.g.,* Ruan 1119–1121; Bernhardt, *supra*, at 3, 24–25. Further inhibiting single-file claims is the slim relief obtainable, even of the injunctive kind. See *Califano* v. *Yamasaki*, 442 U. S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established."). The upshot: Employers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations.

In stark contrast to today's decision,[16] the Court has repeatedly recognized the centrality of group action to the effective enforcement of antidiscrimination statutes. With Court approbation, concerted legal actions have played a critical role in enforcing prohibitions against workplace discrimination based on race, sex, and other protected characteristics. See, *e.g., Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971); *Automobile Workers* v. *Johnson Controls, Inc.*, 499 U. S. 187 (1991). In this context, the Court has comprehended that government entities charged with enforcing antidiscrimination statutes are unlikely to be funded at levels that could even begin to compensate for a significant dropoff in private enforcement efforts. See

[15] Based on a 2015 study, the Bureau of Consumer Financial Protection found that "pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief." 82 Fed. Reg. 33210 (2017).

[16] The Court observes that class actions can be abused, see *ante,* at 24, but under its interpretation, even two employees would be stopped from proceeding together.

Newman v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 401 (1968) (*per curiam*) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law."). That reality, as just noted, holds true for enforcement of wage and hours laws. See *supra,* at 27.

I do not read the Court's opinion to place in jeopardy discrimination complaints asserting disparate-impact and pattern-or-practice claims that call for proof on a group-wide basis, see Brief for NAACP Legal Defense & Educational Fund, Inc., et al. as *Amici Curiae* 19–25, which some courts have concluded cannot be maintained by solo complainants, see, *e.g., Chin* v. *Port Auth. of N. Y. & N. J.*, 685 F. 3d 135, 147 (CA2 2012) (pattern-or-practice method of proving race discrimination is unavailable in non-class actions). It would be grossly exorbitant to read the FAA to devastate Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e *et seq.*, and other laws enacted to eliminate, root and branch, class-based employment discrimination, see *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 417, 421 (1975). With fidelity to the Legislature's will, the Court could hardly hold otherwise.

I note, finally, that individual arbitration of employee complaints can give rise to anomalous results. Arbitration agreements often include provisions requiring that outcomes be kept confidential or barring arbitrators from giving prior proceedings precedential effect. See, *e.g.,* App. to Pet. for Cert. in No. 16–285, p. 34a (Epic's agreement); App. in No. 16–300, p. 46 (Ernst & Young's agreement). As a result, arbitrators may render conflicting awards in cases involving similarly situated employees—even employees working for the same employer. Arbitrators may resolve differently such questions as whether certain jobs are exempt from overtime laws. Cf. *Encino Motor Cars,* *LLC* v. *Navarro*, *ante,* p. ___ (Court divides on whether "service advisors" are exempt from overtime-pay requirements). With confidentiality and no-precedential-value provisions operative, irreconcilable answers would remain unchecked.

* * *

If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts harking back to the type called "yellow dog," and of the readiness of this Court to enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their "mutual aid or protection." Accordingly, I would reverse the judgment of the Fifth Circuit in No. 16–307 and affirm the judgments of the Seventh and Ninth Circuits in Nos. 16–285 and 16–300.

NOTES

NOTES

11

Class Action Ethics Issues (March 26, 2019)

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David G. Keyko is a litigation partner in the New York City office of Pillsbury Winthrop Shaw Pittman LLP, and Andrew J. Kim was a litigation associate in this office. Stephen R. Weingold, a litigation associate in this office updated the outline.

1. FINDING A CLIENT – SOLICITATION OF CLASS MEMBERS/ DEFENDANTS

A. What Is a "Solicitation"?

i. Comment [1] to ABA Model Rule 7.3 – defines "solicitation" to mean "a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services." The comment distinguishes such targeted communications from those directed at the public generally, "such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches."

ii. NY Rule 7.3(b) – Solicitations are "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client."

iii. VA Rule 7.3(f) – "In person solicitation means face to face communication and telephone communication."

iv. Comment [5] to DC Rule 7.1 – solicitation can occur through mass media or individual personal contact (which includes telephone contact, but not e-mail).

v. TX Rule 7.03 and corresponding Comment [1] – explain that the prohibition applies to in-person contact and "regulated telephone or other electronic contact," defined as "electronic communication initiated by a lawyer or by any person acting on behalf of a lawyer or law firm that will result in the person contacted communicating in a live, interactive manner with any other person by telephone or other electronic means. This does not include communications such as pre-recorded voicemail messages or a website.

vi. CA Rule 7.3(e) – a "solicitation" refers to "an oral or written targeted communication initiated by or on behalf of the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services." Corresponding Comment [1] clarifies that solicitations do not include communications directed to the general public, such as through a billboard, an Internet banner advertisement, a website, internet search, or a television commercial, or if the communication is in response to a request for information.

B. <u>Solicitation Rules Generally</u>

i. ABA Model Rule 7.3

a. Provides that a lawyer "shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted . . . is a lawyer; or has a family, close personal, or prior professional relationship with the lawyer."

b. Provides that a lawyer "shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if . . . the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or the solicitation involves coercion, duress or harassment."

c. Provides that "[e]very written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words 'Advertising Material' on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication" unless the recipient is a lawyer, or has a family, close personal, or prior professional relationship with the lawyer.

ii. Each jurisdiction has adopted its own solicitation rules. It is important to look at the rules in the jurisdiction in which you are advertising to ensure compliance with the rules and any applicable labeling and/or filing requirements.

a. NY Rule 7.3(a), TX Rule 7.03(a), DC Rule 7.1(b)(1), CA Rule 7.3(a) – Direct Solicitations. Absolute prohibition on soliciting clients in person, by telephone or by "real-time or interactive computer-accessed communications unless the recipient is a close friend, relative, former client or existing client."

(1) NY Rule 7.3

(A) Comment [9] to Rule 7.3 makes clear that ordinary email is not considered to be real-time or interactive communication.

(B) Pursuant to NY Rule 7.3(c), a lawyer or law firm, at the time of dissemination, is required to file a copy of a direct solicitation with the disciplinary committee in the department in which the lawyer or firm has his, hers or its principal office.

(C) Unlike under the ABA Rules, in New York, communications to obtain business from a former or existing client are not considered solicitations. However, in New York, a lawyer must not solicit business from someone the lawyer knows, due to age or a mental illness, would not "exercise reasonable judgment" in deciding to retain the lawyer. Further, a lawyer must not solicit business from someone whose work will be handled by someone who is not affiliated with the soliciting lawyer as a partner, associate or of counsel.

(2) NY State Bar Ass'n Op. 899 (2011). A lawyer may provide general answers in response to legal questions from laypersons on the Internet but may not engage in "solicitation."

(3) CA Bar Ass'n Op. 186 (2012). Where an attorney posts status updates on her Facebook page (viewable only by her Facebook friends) that relate to her profession, such postings must comply with attorney advertising solicitation rules.

b. Virginia has not adopted an absolute prohibition on in-person solicitation. VA Rule 7.3 allows in-person solicitation except where it contains false or misleading statements or is likely to involve coercion, duress, intimidation, or in cases involving personal injury or wrongful death.

C. Solicitation in Class Action Suits

i. ABA Model Rules do not address solicitation in the context of class actions.

ii. ABA Rule 7.3 states that a lawyer cannot solicit clients using real-time communications, unless the lawyer has a close personal or prior professional relationship with the potential client.

a. But Comment [4] to Rule 7.2 states that neither Rule 7.2 nor 7.3 prohibit communications authorized by law, such as notice to members of a class in class action litigation.

iii. NY Rule 7.1(f) states that advertisements must be labeled with the words "Attorney Advertising."

a. This includes "solicitations" on a lawyer's website seeking putative class members.

b. Note NY Rule 7.1(e)(3) requiring the disclaimer: "Prior results do not guarantee a similar result."

D. Retaining copies of solicitations and advertisements

i. NY Rule 7.3(c) – a lawyer/firm is required to file a copy of a direct solicitation at time of dissemination with the disciplinary committee in the department in which the lawyer/firm has its principal office.

ii. VA Rule 7.2(b) – a recording of an electronic media advertisement shall be retained by the lawyer for one year after the last broadcast date and shall be provided to the Bar Ass'n upon request.

iii. TX Rule 7.04(f) – a lawyer must retain a copy or recording of each advertisement in the public media for four years after its last dissemination.

iv. DC Rule 7.1 does not require a lawyer to retain copies of solicitations or advertising.

v. CA Rule 7.3 does not require a lawyer to retain copies of solicitations or advertising

2. SETTLEMENT COMMUNICATIONS WITH CLASS MEMBERS – WHO DOES PLAINTIFFS' COUNSEL ACTUALLY REPRESENT FOR PURPOSES OF THE NO-CONTACT RULE?

A. <u>Rules</u>

i. ABA Model Rule 4.2[2] and NY Rule 4.2(a)

a. Under both, when representing a client, lawyers shall not communicate about the subject of the representation with a person they know to be *represented* by another lawyer in the matter, unless they have the consent of the other lawyer or are authorized by law or court order.

b. "Provides protection of the represented person against overreaching by adverse counsel and safeguards the client-lawyer relationship from interference by adverse counsel." – ABA Formal Op. 396 (1995).

ii. ABA Model Rule 4.2 Comments.

a. Comment 3 notes that Rule 4.2 applies even if the represented person initiates or consents to the communication. In such cases, lawyers must immediately terminate the communication.

b. Comment 6 instructs that a lawyer, who is uncertain whether communication with a represented person is permissible, may seek a court order. In exceptional circumstances, a court order may override compliance with Rule 4.2

iii. ABA Model Rule 4.3 establishes a lawyer's obligations when communicating (or "dealing") with an unrepresented person (person means not only people, but also organizations and other entities – Rule 1.0(n)).

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2. New York Rule of Professional Conduct 4.2(b) provides that, unless otherwise prohibited, a lawyer "may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place." Subdivision (c) provides that a lawyer "who is acting *pro se* or is represented by counsel in a matter is subject to paragraph (a)," but may communicate with represented persons, provided that they are legally competent and are given reasonable advance notice by the lawyer. ABA Rule 4.2 lacks corresponding subdivisions (b) and (c).

a. In dealing with an *unrepresented* person on behalf of a client, lawyers must not state or imply that they are disinterested. When lawyers know or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, lawyers must make reasonable efforts to correct the misunderstanding. Lawyers must not give legal advice to such persons if they know or should know that the interests of such persons are or have a reasonable possibility of being in conflict with the client's interests.

b. In DC, New York, California, and Virginia, Rule 4.3 also prohibits a lawyer from giving legal advice to the person if the person's interests are in conflict with those of the lawyer's client.

iv. ABA Model Rule 4.3 Comments.

a. Comment 1 instructs that, in complying with Rule 4.3, lawyers "will typically need to identify the lawyer's client," and where necessary, explain to the unrepresented persons that their interests may conflict with the interests of the lawyers' clients. (This comment was not adopted by DC, Virginia, California, or Texas.)

b. Comment 2 notes that whether a lawyer's advice is impermissible in this context "may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur." For one, Rule 4.3 does not prohibit lawyers from negotiating a transaction or a settlement agreement with an unrepresented person, so long as lawyers explain their adverse position. (This comment was not adopted by California, Virginia or Texas.)

v. ABA Model Rule 4.4(a) and NY Rule 4.4(a)

a. In representing a client, lawyers must not use means that have no substantial purpose other than to "embarrass, delay or burden a third person," under ABA's Rule 4.4(a), or "embarrass or harm a third person," under NY Rule 4.4(a). Further, under both Rules, lawyers must not "use methods of obtaining evidence that violate the legal rights of such a person."

vi. ABA Model Rule 4.4 Comments.

a. Comment 1 explains that, while a lawyer's responsibility to clients requires the lawyer to subordinate the interests of others, the lawyer may not disregard the rights of third persons. There may be legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships.

B. <u>Post-Certification</u>

i. NY and most jurisdictions bar contact with class members post-certification.

C. <u>Prior to Certification</u>

i. The majority rule is that after a class action is filed but prior to certification, contact is permitted between counsel for a defendant and members of putative class, but not between defense counsel and members known to be directly represented – Restatement Third of the Law Governing Lawyers, § 99 comment I (2003).

ii. In jurisdictions that follow the majority rule, prior to a class action being filed, a prospective defendant is free to communicate with potential class members in order to remedy alleged grievances and obtain releases from liability – Newberg on Class Actions §15:11. Courts recognize that defendants have an interest in communicating with putative class members prior to certification.

a. *Keystone Tobacco Co. v. U.S. Tobacco Co.*, 238 F. Supp.2d 151 (D.D.C. 2002).

b. *Agerbrink v. Model Serv. LLC*, No. 14 CIV. 7841 JPO JCF, 2015 WL 6473005, (S.D.N.Y. Oct. 27, 2015)

c. *The Kay Company, LLC v. Equitable Production Co.*, 246 F.R.D. 260 (S.D. W. Va. 2007).

iii. NY and NJ permit contact with putative class members prior to certification.

iv. Majority Rule: ABA Formal Op. 07-445.

a. Putative class members are not represented parties prior to certification of the class and the expiration of the opt-out period. Therefore, ABA Model Rule 4.2 does not prohibit counsel from contacting putative class members.

b. ABA Model Rule 4.3, which applies to communications with unrepresented persons, permits factual inquiries but prohibits counsel from providing legal advice.

c. If plaintiffs' counsel contacts putative class members seeking to represent them, such communications are governed by ABA Model Rule 7.3

d. This is the majority rule.

(1) New York City Bar Ass'n Op. 2004-01.

(2) *In re McKesson HBOC Sec. Litig.*, 126 F. Supp. 2d 1239 (N.D. Cal. 2000).

(3) *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. 05-MD-1720 JG, 2014 WL 4966072 (E.D.N.Y. Oct. 3, 2014), appeal withdrawn (Feb. 17, 2015)*

v. Minority rule and choice of law: Philadelphia Bar Ass'n Op. 2009-1.

a. Client was a defendant in a class action brought by its employees pending in Pennsylvania federal court where plaintiffs were seeking, but had not yet moved for, a nationwide class certification. Client was also a defendant in a class action brought by its employees pending in New Jersey federal court where plaintiffs were seeking, but had not yet moved for, a New Jersey statewide class certification. Client was represented by separate in-house attorneys in both cases.

b. Contrary to the majority of jurisdictions, Pennsylvania courts interpret Rule of Professional Conduct 4.2 as prohibiting counsel from contacting class members even before class certification.

c. Whether counsel in the New Jersey action can communicate with members of the putative New Jersey class prior to certification is question for New Jersey law, even though the putative New Jersey class members may also be members of the putative Pennsylvania nationwide class.

d. Counsel in the Pennsylvania action may be able to contact members of the putative New Jersey class prior to certification, even if they are also putative members of the Pennsylvania nationwide class, if New Jersey law permits such contact. However, the Opinion urges caution and recommends raising the issue with the Pennsylvania court prior to any contact.

e. Counsel in the Pennsylvania action probably cannot use in the Pennsylvania action information obtained by counsel in the New Jersey action from the putative class members in the New Jersey action who are also putative members of the Pennsylvania nationwide class.

f. Pennsylvania courts do not follow the majority rule either.

(1) PA courts interpret Rule 4.2 as barring defense counsel in a class action from contacting putative class members as they are considered represented by class counsel.

(A) *Gates v. Rohm and Haas Co*., 2006 U.S. Dist. LEXIS 85562 *7 n.2 (E.D. Pa. Nov. 22, 2006).

vi. Applicable law is that of the forum.

D. <u>Communications for Purposes of Gathering Information</u>

i. Are all current and former employees of an adverse party off limits?

ii. Comment [7] to ABA Model Rule 4.2 states that where an organization is the represented party:

a. Rule 4.2 prohibits communications with those persons who supervise, direct, or consult with the organization's lawyer concerning the matter, or

b. Those who can bind the organization with respect to the matter through their action or inaction.

iii. The rule does not prohibit communication directly with the organization's former employees.

a. *Neisig v. Team I*, 76 N.Y.2d 363 (1990), holding that communications with the former employees and certain current employees of a represented corporation were not barred by the no-contact rule.

b. *Muriel Siebert & Co., Inc. v. Intuit Inc.*, 8 N.Y.3d 506 (2007).

c. *Thurston v. Okemo Liab. Co.*, 123 F. Supp. 3d 513, 516 (D. Vt. 2015)

iv. New Jersey prohibits contact with the "litigation control group," defined as those with significant involvement in determination of the corporation's legal position – N.J. R. Prof'l Conduct 1.13(a).

3. THE USE OF INFORMAL DISCOVERY TOOLS, INCLUDING INVESTIGATORS, SOCIAL MEDIA AND THE INTERNET

A. Informal Discovery Generally

i. ABA Model Rule 4.2[3] and NY Rule 4.2(a) – in representing a client, lawyers shall not communicate about the subject of the representation with a person they know to be *represented* by another lawyer in the matter, unless they have the consent of the other lawyer or are authorized by law or court order.

ii. ABA Model Rule 4.2 Comments.

a. Comment 3 notes that Rule 4.2 applies even if the represented person initiates or consents to the communication. In such cases, lawyers must immediately terminate the communication.

b. Comment 4 clarifies that Rule 4.2 "does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation." Further, lawyers may be found in violation of Rule 4.2 through the acts of another. See Rule 8.4(a).

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3. New York Rule of Professional Conduct 4.2(b) provides that, unless otherwise prohibited, a lawyer "may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place." Subdivision (c) provides that a lawyer "who is acting *pro se* or is represented by counsel in a matter is subject to paragraph (a)," but may communicate with represented persons, provided that they are legally competent and are given reasonable advance notice by the lawyer. ABA Rule 4.2 lacks corresponding subdivisions (b) and (c).

c. Comment 5 provides examples of communications "authorized by law": (1) on behalf of a client who is exercising a constitutional or other legal right, lawyers may communicate with the government; and (2) in representing government agencies, lawyers may, directly or through investigative agents, engage in investigative activities prior to the commencement of criminal or civil proceedings.

d. Comment 6 instructs that a lawyer, who is uncertain whether communication with a represented person is permissible, may seek a court order. In exceptional circumstances, a court order may override compliance with Rule 4.2

e. Comment 7 applies to communications with represented organizations. In such instances, lawyers must not communicate with a "constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Communication with a *former* constituent, however, does not require consent of the organization's lawyer. In such cases, lawyers must also comply with Rule 4.4, which prohibits methods of obtaining evidence that violate the legal rights of the organization.

 (1) *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147, 1155 (D.S.D. 2001), *aff'd sub nom. Midwest Motor Sports v. Arctic Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003), contains a helpful survey of the numerous tests that attempt to "strike[] an appropriate balance between the interests of the corporation and the need of adverse parties to conduct inexpensive informal discovery." *Id*.

  (A) The "blanket" test, which "bar[s] all *ex parte* contact with current and former corporate employees";

(B) The "scope of employment" test, which "prohibits contact with corporate employees about matters within the scope of their employment";

(C) The "managing-speaking-agent" test, which "allows *ex parte* contact with corporate employees except for those who have legal authority ('speaking authority') to bind the corporation in a legal evidentiary sense";

(D) The "balancing" test, which is "applied case-by-case to determine the degree to which ex parte communication is necessary to reveal relevant information, the danger of generating admissions against the corporation that are admissible at trial under Federal Rule of Evidence 801(d)(2)(D), and the degree to which the effective representation of counsel requires corporate counsel to be present at employee interviews"; and

(E) The "control group" test, which "allows *ex parte* contact with all current corporate employees except the most senior management officials in the corporation's 'control group.'"

f. Comment 8 adds that in order for Rule 4.4 to apply, a lawyer must have "actual knowledge" of the fact that a person is represented. Actual knowledge, however, may be inferred from the circumstances. Lawyers may not "clos[e] eyes to the obvious."

g. *McCargo v. Texas Roadhouse, Inc.*, 2011 U.S. Dist. LEXIS 4314 (D. Colo. Jan. 12, 2011). Not proper for lawyer representing a corporation to block opponent from questioning low level employees by making a blanket statement that the lawyer represents all corporate employees when not all the employees had agreed to be represented by the lawyer.

iii. ABA Model Rule 4.3 and NY Rule 4.3 – in dealing with an *unrepresented* person on behalf of a client, lawyers must not state or imply that they are disinterested. When lawyers know or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, lawyers must make reasonable efforts to correct the misunderstanding. Lawyers must not give legal advice to such persons if they know or should know that the interests of such persons are or have a reasonable possibility of being in conflict with the client's interests.

iv. ABA Model Rule 4.3 Comments.

a. Comment 1 instructs that, in complying with Rule 4.3, lawyers "will typically need to identify the lawyer's client," and where necessary, explain to the unrepresented persons that their interests may conflict with the interests of the lawyers' clients.

b. Comment 2 notes that whether a lawyer's advice is impermissible in this context "may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur." For one, Rule 4.3 does not prohibit lawyers from negotiating a transaction or a settlement agreement with an unrepresented person, so long as lawyers explain their adverse position.

v. ABA Model Rule 4.4(a) and New York Rule of Professional Conduct 4.4(a) – in representing a client, lawyers must not use means that have no substantial purpose other than to "embarrass, delay or burden a third person," under ABA's Rule 4.4(a), or "embarrass or harm a third person," under New York's Rule 4.4(a). Further, under both Rules, lawyers must not "use methods of obtaining evidence that violate the legal rights of such a person."

vi. ABA Model Rule 4.4 Comments.

a. Comment 1 explains that, while a lawyer's responsibility to clients requires the lawyer to subordinate the interests of others, the lawyer may not disregard the rights of third persons. There may be legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships.

vii. *Niesig v. Team I*, 76 N.Y.2d 363 (1990).

a. Relevant facts and procedural history:

(1) Plaintiff, a construction worker, was injured when he fell at a work site. He sued his employer, the general contractor and the property owner.

(2) Plaintiff moved for permission to conduct *ex parte* interviews of all employees who were at the site when and where plaintiff was injured.

(3) The Appellate Division rejected the plaintiff's request, concluding that the defendant employer's current employees are within the scope of representation afforded by the employer's company counsel.

b. Held:

(1) As the Appellate Division held, *former* employees are indeed not within the company counsel's scope of representation. *Id.* at 369. Former employees may be interviewed informally.

(2) As for *current* employees, the company counsel's scope of representation covers only those current employees "whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter egos') or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel." *Id.* at 374. All other current employees may be interviewed informally.

viii. NY State Bar Ass'n Comm. on Professional Ethics Formal Op. 735 (2001)

a. Under New York Rules[4], lawyers may properly interview an *unrepresented* witness for the opposing side without

4. This opinion refers to the old New York provision, DR 7-104(A)(1), which provides that while representing a client, lawyers must not "[c]ommunicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so."

the consent of opposing counsel. In this case, that unrepresented witness was an accountant hired as an independent contractor by the opposing party, a corporation.

b. On ascertaining whether such witnesses are in fact represented by the corporation's counsel.

(1) The analysis set forth by the New York Court of Appeals in *Niesig* governs the question of whether independent contractors or employees are represented by the corporation's counsel. Communication is prohibited with those "corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter ego') or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees may be interviewed informally." *Id.* at 374.

(2) Lawyers may interview *former* employees, even if they were once privy to the adversary employer's privileged and confidential information. Lawyers must, however, refrain from eliciting privileged information from such former employees. *See Muriel Siebert & Co., Inc. v. Intuit Inc.*, 8 N.Y.3d 506 (2007).

(A) In *Muriel Siebert*, the defense counsel interviewed without the plaintiff corporation's consent its former "Executive Vice President and Chief Operating Officer," who was "both an important participant in the events at issue . . . and a member of [plaintiff's] 'litigation team' after the lawsuit began." *Id.* at 509. Before the interview began, defense counsel advised the former COO not to disclose any privileged or confidential information, including plaintiff's legal strategy and any conversations the former COO had with plaintiff's counsel. *Id.* at 510.

Today's equivalents are ABA Model Rule 4.2 and New York Rule of Professional Conduct 4.2(a). They are substantively identical.

(B) The trial court disqualified defense counsel because "there was 'an appearance of impropriety' based upon the possibility that privileged information had been disclosed during the interview."

(C) The Appellate Division reversed, and the Court of Appeals affirmed the Appellate Division. Disqualification of defense counsel was not warranted "merely because [the former COO] was at one time privy to [plaintiff's] privileged and confidential information." *Id.* at 511. Since defense counsel conformed to all other applicable ethical standards by properly advising the former COO before the interview began, there was no basis for disqualification. *Id.* at 512.

(D) For a further analysis on *former* employees, see American Bar Ass'n Formal Ethics Op. 91-359 (1991). In conducting informal interviews with such formal employees, lawyers must comply with Rules 4.3 and 4.4. *Id.* That said, "a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may . . . communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer." *Id.*; *Niesig*, 76 N.Y.2d at 369 (affirming that former employees are not considered to be represented by the company counsel).

c. On the extent of permissible communications.

(1) Lawyers may not deliberately elicit privileged or confidential information from an unrepresented employee-witness who is not authorized to make disclosure. In this case, if the lawyer discovers that the *only* relevant information possessed by the unrepresented employee-witness is protected from disclosure, then communication with that unrepresented employee-witness would be improper.

d. See also Rule 4.3.

(1) In dealing with an *unrepresented* person on behalf of a client, lawyers must not state or imply that they are disinterested. When lawyers know or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, lawyers must make reasonable efforts to correct the misunderstanding. Lawyers must not give legal advice to such persons if they know or should know that the interests of such persons are or have a reasonable possibility of being in conflict with the client's interests.

e. If counsel for one of the parties represents a third party witness, then the opposing counsel may not interview that witness because of Rule 4.2. Counsel for a party may only represent a third-party witness if there is no conflict between the interests of the party represented by the lawyer and the third-party witness. When a party's counsel represents a third-party witness, an engagement letter should be signed by the third-party. The engagement letter should include permission from the third-party to allow the lawyer to be paid for the legal work by the party (Rule 1.8(f)) and disclosure about the risks of joint representation (Rule 1.7, Comments [29] – [33]).

When a lawyer for a party offers to represent a third-party witness, the lawyer should consider Rule 7.3, which forbids a lawyer to solicit paying legal work on a real time basis (*e.g.*, telephone or in person) from anyone who is not a close friend, relative, former or existing client of the lawyer and the policies encouraging informal discovery. These issues are discussed in NYCAL Prof'l. Ethics Comm., Op. 747 (2014). The opinion states that a lawyer representing a corporation can offer to represent potential witnesses who are also employees in person, without this constituting an improper solicitation, provided his purpose for communicating with the potential witness was (1) to gather information, not to secure legal fees from a new client, and (2) the legal solicitation is because the lawyer believes the witness would benefit from representation, not a pure tactical move meant to deprive his opponent from access to a potential witness. On the other hand, a lawyer may improperly solicit potential witnesses if his goal in offering to represent them is to deprive his opponent of the ability to conduct informal discovery. The opinion narrowly reads *Rivera v. Lutheran Medical Center*, 22 Misc. 3d 178, 866 N.Y.S.2d 520 (Kings Cnty. Sup. Ct. 2008), *aff'd*, 73 A.D.3d 891, 899 N.Y.S.2d 859 (2d Dep't 2010), which disqualified a law firm from representing third-party witnesses it solicited in real time. The NYCAL opinion interprets *Rivera* as disqualifying the law firm because sought to represent the third parties to thwart informal discovery. That decision, however, could be read as finding that a real time offer to represent a third-party witness violates Rule 7.3. *But see* Wells Fargo Bank, N.A. v. LaSalle Bank Nat. Ass'n, No. CIV-08-1125-C, 2010 WL 1558554, at *2 (W.D. Okla. Apr. 19, 2010)(The court denied a motion to disqualify counsel based on such a Rule 7.3 argument. The court found that the lawyers were not offering to represent the third parties to obtain new paying work, but rather to further the representation of the client the firm already had.).

B. Social Media

i. The internet in general, and social media in particular, is increasingly being used by attorneys and investigators to gather information about opposing parties, witnesses and potential jurors. Recent ethics opinions have generally held that an attorney is permitted to access public social media sites to gather information, provided the attorney does not engage in deception (there is disagreement, however, as to what constitutes deception).

ii. Attorneys must be mindful not to disclose any confidential information in their own use of social media, blogs, and other websites. For example, attorneys should be mindful that shared contact/friend lists and social networks may identify clients.

a. *In re Kristine Ann Peshek*, M.R. 23794, 2009 PR 00089 (Ill. May 18, 2010). Attorney received a 60-day suspension for posting client confidential information on her blog while serving as an Assistant Public Defender.

iii. Social media is also increasingly being used for lawyer advertising. ABA Model Rule 7.1, which prohibits lawyers from making "a false or misleading communication about the lawyer or the lawyer's services," applies to online advertising and electronic communications used to attract clients.

   a. This rule was adopted by DC, California, and Virginia. NY Rule 7.1 and TX Rule 7.02 similarly prohibit false or misleading statements.

   b. Attorneys should be mindful of sites, such as Linkedin, which allow users to identify "specialties."

iv. An interesting article regarding lawyers using social media can be found at: http://www.abajournal.com/magazine/article/seduced_for_lawyers_the_appeal_of_social_media_is_obvious_dangerous/.

v. The Ass'n of the Bar of the City of New York Comm. on Professional and Judicial Ethics Formal Op. 2010-2 (2010).

   a. Lawyers and their agents may use their real names and profiles to send a "friend request" to obtain information from an unrepresented person's social networking site. Lawyers and their agents are not required to disclose the reasons for making such requests but may not attempt to do so under false pretenses or names.

   b. On creating fake profiles to reach unrepresented individuals.

      (1) Rules 4.1 and 8.4(c) prohibits lawyers or their investigators from creating false social networking profiles to reach unrepresented individuals. Such behavior would constitute "conduct involving dishonesty, fraud, deceit or misrepresentation," Rule 8.4(c), and a knowingly made "false statement of fact or law to a third person," Rule 4.1.

c. On the applicability of Formal Op. 2010-2 to agents and investigators.

   (1) "[I]t does not matter whether the lawyer employs an agent, such as an investigator, to engage in the ruse."

   (2) Rule 8.4(a) prohibits a lawyer from violating or attempting to violate the Rules of Professional Conduct "through the acts of another."

   (3) Rule 5.3(b)(1) holds lawyers responsible for conduct of nonlawyers employed, retained or associated with the lawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer, if the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct.

d. On rare instances where no other option is available to obtain such evidence.

   (1) While deception may be permissible in such rare instances, the "utility and ethical grounding" of those limited exceptions are mostly inapplicable to social networking websites. Non-deceptive means of communication are ordinarily available, so trickery cannot be justified as a necessary last resort.

e. On Formal Op. 2010-2's due deference to New York's policy favoring informal discovery.

   (1) *See Niesig v. Team I*, 76 N.Y.2d 363, 372 (1990) (overruling the Appellate Division because its rule "closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes").

   (2) *See Muriel, Siebert & Co. v. Intuit Inc.*, 8 N.Y.3d 506, 511 (2007) (recognizing that "the importance of informal discovery underlies [the court's] holding").

vi. NY Bar Ass'n Commercial and Litigation Section, Social Media Ethics Guidelines (Updated May 11, 2017); NY State Bar Ass'n Comm. on Professional Ethics Formal Op. 843 (2010); and NYCB Formal Op. 2010-2 (2010).

a. If an opposing party's social networking site does not require pre-approval to gain access to its content (*i.e.*, no "friend request" approval is required before viewing the underlying content), a lawyer may ethically view and access the site but may neither "friend" the opposing party nor direct someone else to do so.

b. On the applicability of Rule 8.4.

(1) Where the social networking site the lawyer wishes to view is accessible to all members of the network, Rule 8.4 would not be implicated because the lawyer is merely accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way.

(2) Obtaining information about an opposing party from such "public" social networking user profiles is similar to obtaining information from publicly accessible online or print media, which is plainly permitted.

c. On the prohibition against "friending" both represented and unrepresented parties.

(1) Rule 4.2, the "no-contact" rule, prohibits a lawyer from communicating with a *represented* party about the subject of the representation, absent prior consent from the represented party's lawyer. "Friending" constitutes communication.

(2) Rule 4.3 governs where a lawyer attempts to "friend" an *unrepresented* party in the matter. In doing so, lawyers must not state or imply that they are disinterested; lawyers must correct any misunderstanding as to their role; and lawyers must not give legal advice other than the advice to secure counsel if the unrepresented party's interests are likely to conflict with those of the lawyers' clients.

(3) The "Social Media Guidelines" at 18-19 addresses the scenario involving an adverse unrepresented *witness* and cite a number of ethics opinions that require that a lawyer do more than simply use her or his correct name, disagreeing with NYCBA, Formal Op. 2010-2. *See* N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012/13/10 (2012), Phil. Bar Ass'n Professional Guidance Comm. Formal Op. 2009-02 (2009), Oregon State Bar Comm. On Legal Ethics, Formal Op. 2012-189 (2013).

vii. Philadelphia Bar Ass'n Professional Guidance Comm. Formal Op. 2009-02 (2009).

a. PA Rules 8.4 and 4.1 prohibit lawyers from asking or ordering a third person, someone whose name an unrepresented witness will not recognize, to "friend" an unrepresented witness, in order for the lawyers to gain access to the information on the unrepresented witness's social networking site. The lawyer must identify him or herself as a lawyer and explain the reason for the friending request.

b. On whether government or civil rights lawyers may use such methods.

(1) *See People v. Pautler*, 47 P.3d 1175, 1180 (Colo. 2002) (holding that no deception whatsoever is allowed, even if driven by "noble motive").

(2) *See In Re Gatti*, 8 P.3d 966, 975-76 (holding that, under Oregon law, no deception is permissible, even by a government lawyer or in civil rights investigations).

c. On whether lawyers may use the information so unethically gathered during trial.

(1) This issue is beyond the scope of the Committee. It is a matter of substantive and evidentiary law to be addressed by the trial court.

viii. San Diego County Bar Legal Ethics Comm. Op. 2011-2 (2011).

a. A lawyer may not make an *ex parte* "friend request" on social media websites to represented and unrepresented persons who are involved in the matter that is the subject of the lawyer's representation. Such a friend request would violate ABA Model Rule 4.2, which has been adopted in California.

b. On whether the communication is "about the subject of the representation."

    (1) "If the [friend request] is *motivated* by the quest for information about the subject of the representation, the communication with the represented party is about the subject matter of the representation."

    (2) The "friend request" will be "about" or concerning the subject of the representation even if a lawyer does not directly reference the subject of the representation in the "friend request."

    (3) Conceptually, a communication "about the subject of the representation" has a broader scope than a communication "relevant to the issues in the representation," which determines admissibility at trial.

c. On whether "friending" a represented party is the same as accessing a public website.

    (1) The two are different. A lawyer is making a "friend request" exactly because the information on the represented party's Facebook page is unavailable and restricted to the general public.

d. On a lawyer's duty not to deceive.

    (1) By making such a "friend request" without disclosing the reason that the request is being made, a lawyer also "violates his ethical duty not to deceive." CA Rule 4.1(a) and California's common law duty not to deceive prohibit such acts.

e. On "friend requests" to unrepresented persons.

    (1) Such requests are also prohibited. A lawyer should not send "friend requests" to an unrepresented person involved in the matter without disclosing the lawyer's affiliation and purpose for the request.

    (2) New York's 2010-2 Op. held otherwise, but Philadelphia's 2009-02 Op. is more persuasive.

C. Investigators

i. ABA Model Rule 8.4 and NY Rule 8.4

a. Under subdivision (a) of both Rules, a lawyer shall not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another";

b. Under subdivision (c) of both Rules, a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

ii. ABA Model Rule 5.3 and NY Rule 5.3

a. Under the ABA's subdivision (c)(1) and New York's subdivision (b)(1), a lawyer shall be responsible for the conduct of a nonlawyer employed, retained by or associated with the lawyer, if the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved.

iii. ABA Model Rule 5.3 Comments.

a. Comment 1 notes that Rule 5.3 applies to nonlawyers both within and outside the lawyer's firm.

b. Comment 2 clarifies that nonlawyers within the lawyer's firm include "secretaries, investigators, law student interns, and paraprofessionals." The measures employed in supervising such nonlawyers should account for the fact that nonlawyers do not have legal training and are not subject to professional discipline.

c. Comment 3 addresses the use of nonlawyers outside the lawyer's firm. Such examples include "the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information." When using such services outside the firm, lawyers must consider factors such as "the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality."

d. Comment 4 notes that where the client directs particular nonlawyer services to be outsourced, the lawyer should defer to the client concerning the allocation of responsibility between the client and lawyer for monitoring the nonlawyers.

iv. NY Rule 5.3, VA Rule 5.3(c), TX Rule 5.03(b), DC Rule 5.3(c), CA Rule 5.3(c) – A lawyer is "responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer" if the lawyer orders or ratifies the conduct, the lawyer has supervisory authority over the nonlawyer and knew, or should have known, of the conduct at a time where remedial action could have been taken yet failed to prevent or mitigate it.

v. NY State Bar Ass'n Op. 843 (2010). A lawyer may not direct a third party to do something that the lawyer cannot ethically do, like deceive another or omit a material fact, such as having a third party "friend" an unrepresented witness without admitting any association with the lawyer and the real purpose behind "friending" the witness. *See* Philadelphia Bar Op. 2009-02.

vi. NY County Lawyers Ass'n Op. 737 (2007) addresses the use of private investigators.

a. The opinion states that "a lawyer supervising investigators who dissemble would be acting unethically unless (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably and readily available through other lawful means; and (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the New York Lawyer's Code of Professional Responsibility (the "Code") or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties. These conditions are narrow."

b. The decision is controversial and has been subject to criticism for carving out exceptions that some have argued are arbitrary.

c. The "opinion only addresses the situation in which the investigator acts as the lawyer's agent as opposed to the client's agent. *See, e.g., Midwest Motor Sports v. Arctic Cat Sales Inc.*, 347 F.3d 693, 695-6 (8th Cir. 2003) (lawyers had "retained" the investigator and directed the investigator's conduct). The question of agency will likely depend on the facts and circumstances. *See, e.g.*, *Allen v Int'l Truck & Engine*, 2006 U.S. Dist. LEXIS 63720 at *22-25 (S.D. Ind. 2006) (analysis of counsel's level of involvement in investigation)."

d. The opinion cites *Gidatex v. Campaniello Imports, Ltd.*, 82 F. Supp.2d 119, 122 (S.D.N.Y. 1999), which declared that permitting investigators to pose as consumers is an accepted practice and does not amount to making misrepresentations.

vii. ABA Op. 08-451 addresses outsourcing. Its guidance applies to the retention of investigators.

a. The opinion provides that a lawyer outsourcing services should, at a minimum, "consider conducting reference checks and investigating the background of the lawyer or nonlawyer providing the services as well as any nonlawyer intermediary involved."

b. In addition, the opinion stresses that "it may be necessary for the lawyer to provide information concerning the outsourcing relationship to the client, and perhaps to obtain the client's informed consent to the engagement" of the legal vendor because client confidences could be involved in the tasks that are being outsourced. Client confidences are protected by Rule 1.6 and a lawyer cannot be considered to have implied authorization to disclose the confidences to the vendor. Such implied authorization only extends to employees of the lawyer's firm and not to outside entities "over whom the firm lacks effective supervision and control."

4. FUNDING OF EXPENSES

A. By Plaintiff's Counsel

i. ABA Model and NY Rule 1.8(e): state that while representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

a. A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.

b. The NY rule adds that a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred. (This is not part of the ABA Model Rule.)

B. By Third-Party

i. *See generally* ABA Comm'n on Ethics 20/20 Informational Report to the House of Delegates on Litigation Funding (Feb. 2012), available at https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf; Glickman, "Embracing Third-Party Litigation Finance," 43 Florida State University Law Review 1043, 1061-1066 (2016); and NYC Bar Ass'n Ethics, Formal Opinion 2011-2: Third Party Litigation Financing (2011) (addressing non-recourse litigation funding).

ii. The rules on litigation funding vary by jurisdiction and so counsel should research the limitations on the use of non-recourse litigation funding before advising a client on the use of such funding.

iii. Lawyers handling the prosecution of class actions may obtain litigation funding that is not tied to the outcome of any particular case. The interest cost of such funding may be reimbursable as a cost in the event that class counsel is successful, but class counsel should discuss this cost with the class representative and obtain agreement that the cost is appropriate when class counsel is retained or the loan is obtained.

iv. It is not unethical *per se* for a lawyer to represent a client who enters into a non-recourse litigation financing arrangement with a third party lender, although such funding currently is unavailable because of ethics restrictions for the prosecution of a class action—*except* when a lawyer is representing an opt-out plaintiff.

v. But lawyers who do represent an opt-out plaintiff that has received litigation funding should be cognizant of ethical issues such as:

   a. Compromise of confidentiality,

   b. Waiver of attorney-client privilege, and

   c. Potential impact on a lawyer's exercise of independent judgment.

vi. ABA Model Rule 5.4(c) states that a lawyer shall not permit a person who pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

vii. A lawyer may be asked by the client to recommend a source of third party funding or negotiate a financing agreement.

   a. ABA Model Rule 2.1 requires the lawyer to provide candid advice regarding whether the arrangement is in the client's best interest.

viii. A lawyer should also bear in mind the extent to which non-recourse funding can limit a client's recovery.

ix. Risk of waiver of attorney-client privilege arises from provisions in an agreement requiring a claimant to disclose documents and information to financing companies.

   a. This allows financing companies to evaluate the merits of the claim.

x. Financing arrangements may also require a lawyer to inform the financing company of developments in the case.

xi. An argument has been made that common interest privilege does not apply to such communications because the financing company's interest in the outcome is commercial, rather than legal – NY County Bar Ass'n Formal Op. 2011-02.

xii. Agreements may require lawyers to seek the company's consent when taking steps to resolve the lawsuit.

a. Including making or responding to settlement offers, blocking offers a lawyer considers favorable.

xiii. A financing company may try to avoid costs of pursuing a promising line of additional discovery.

xiv. Client may agree to permit a financing company to direct the strategy BUT absent a client's consent, a lawyer cannot allow the company to influence his or her professional judgment in determining the course of the litigation.

xv. A lawyer should not have ownership interest in funding company or receive compensation for referral – NY State Bar Ass'n Formal Op. 666 (1994).

xvi. In suggesting a third party funder to a client, the lawyer should not become part of the loan process – FL Bar Ass'n Formal Op. 2000-3.

xvii. A lawyer should disclose to the client if he or she regularly provides legal services to the funding company – Philadelphia Bar Ass'n Formal Op. 99-8 (2000).

C. <u>Fee-Sharing With Non-Attorneys – the ability of plaintiffs' lawyers to obtain financing for class actions</u>.

i. NY and ABA Model Rule 5.4(a) state that a lawyer may not share legal fees with a non-lawyer.

ii. State ethics opinions have discussed fee-splitting in connection to third party funding:

a. These opinions find that a lawyer may not agree to give a third party funder a share of or a security interest in the fee the lawyer expects to receive under a contingency fee agreement.

b. Because of the restrictions on sharing fees with non-attorneys, clients and not counsel must enter into loan agreements entailing sharing of a percentage of the recoveries. Because of the inability of classes to enter into such agreements, for now such financing is not available to fund class actions unless perhaps the arrangement is approved by the court.

c. Under Rule 5.4(a), a lawyer may not enter into a financing agreement with a non-lawyer litigation funder, under which the lawyer's future payments to the funder are contingent on the lawyer's receipt of legal fees or on the amount of legal fees received in one or more specific matters. NY City Bar Ass'n Formal Op. 2018-5. This is equally applicable when the lawyer's payment to the funder is non-recourse and based on the recovery of legal fees in multiple matters (*e.g.*, a portfolio of lawsuits against the same defendant or involving the same subject matter) as opposed to a single matter.

5. ISSUES RELATING TO COOPERATION AGREEMENTS AMONG LITIGANTS – DEFENSE AND PLAINTIFFS' SIDES

A. *In re Shared Memory Graphics LLC*, 659 F.3d 1336 (Fed. Cir. 2011).

i. AMD and Nintendo were co-defendants in patent infringement litigation over a memory chip. Their joint defense agreement provided: "The parties expressly acknowledge and agree that nothing in this Agreement, nor compliance with the terms of this Agreement by either party, shall be used as a basis to seek to disqualify the respective counsel of such party in any future litigation."

ii. In-house patent counsel for AMD left to join a law firm, which then filed suit against Nintendo on behalf of Shared Memory Graphics over the same memory chip. Nintendo moved to disqualify the firm. The district court concluded that waiver applied only to conflicts between AMD and Nintendo and granted the motion.

iii. The Federal Circuit reversed, holding that the waiver of future conflicts was valid and broad enough to cover the instance of an attorney leaving AMD or Nintendo and representing another party. Judge Newman dissented, arguing that the waiver does not clearly authorize future adverse representation and any doubt should be resolved in favor of the entity whose information is in jeopardy.

B. <u>DC Bar Ass'n Op. 349 (2009).</u>

i. Joint defense agreements with non-clients do not create "former client" conflicts under Rule 1.9.

ii. Joint defense agreements may create obligations to a third party that will cause the lawyer participating in the joint defense to have a conflict under Rule 1.7(b)(4) in a new matter adverse to a joint defense group member; i.e., the lawyer's professional judgment on behalf of the client in the new matter would be adversely affected by the lawyer's obligations under the joint defense agreement.

iii. If a lawyer bound by the joint defense agreement moves to a new firm that seeks to take on a new matter adverse to a member of the joint defense group, no conflict is imputed to the new firm provided the personally disqualified lawyer is screened from the new matter.

iv. If a lawyer bound by the joint defense agreement remains at the same firm and other lawyers of the firm seek to take on a new matter adverse to a member of the joint defense group, those other lawyers will be disqualified unless none of them are bound by the joint defense agreement and none of them were exposed to confidential information from the prior representation.

C. <u>Some jurisdictions have disqualified lawyers from matters adverse to a former joint defense group member where another lawyer in the firm was a member of the joint defense group</u>:

i. *All American Semiconductor, Inc. v. Hynix Semiconductor, Inc.*, 2008 WL 5484552 (N.D. Cal. 2008).

ii. *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996).

6. CONFLICTS OF INTEREST IN CLASS REPRESENTATION

A. <u>Rules</u>

i. ABA Model Rule 1.7

a. ABA Model Rule 1.7(a)(1) prohibits a lawyer from representing a client if "the representation will be directly adverse to another client."

(1) Comment [6] to ABA Model Rule 1.7 provides that "loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated."

(2) Comment [25] to NY and ABA Model Rule 1.7 denotes the majority rule that when a lawyer represents a class in a class action suit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for the purposes of applying Rule 1.7.

b. ABA Model Rule 1.7(a)(2) prohibits a lawyer from representing a client if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

c. ABA Model Rule 1.7(b) provides that notwithstanding a conflict under Rule 1.7(a), a lawyer may still represent a client if:

(1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law;

(3) The representation does not involve the assertion of claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) Each affected client gives informed consent, confirmed in writing.

d. ABA Model Rule 1.7 has been adopted by New York and, in slightly modified form, by Virginia and California.

ii. DC Rule 1.7

a. DC Rule 1.7(a) provides that "a lawyer shall not advance two or more adverse positions in the same matter."

b. Moreover, Rule 1.7(b) provides that "a lawyer shall not represent a client with respect to a matter if: (1) That matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer; (2) Such representation will be or is likely to be adversely affected by representation of another client; (3) Representation of another client will be or is likely to be adversely affected by such representation; (4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests."

c. However, a lawyer may represent a client with respect to a matter in the circumstances described in Rule 1.7(b) if "[e]ach potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." (D.C. Rule 1.7(a).)

iii. TX Rule 1.06

a. Under TX Rule 1.06(a), "a lawyer shall not represent opposing parties to the same litigation."

b. TX Rule 1.06(b) further prohibits (except as noted below) a lawyer from representing a person if the representation "(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyers firm; or (2) reasonably appears to be or become adversely limited by the lawyers or law firm's responsibilities to another client or to a third person or by the lawyers or law firm's own interests."

c. However, a lawyer may represent a client in the circumstances described in (b) if "(1) the lawyer reasonably believes the representation of each client will not be materially affected; and (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any." (TX Rule 1.06(c).)

B. Duties to Class Members

i. Though interests of class members may differ, it is rarely practical for a lawyer to speak individually with each class member.

a. In some circumstances, non-consenting class members may opt out of the class action – Fed. R. Civ. P. 23(a)(4), (g)(1)(B).

ii. In ordinary class actions, a lawyer is required to seek individual consents before filing a lawsuit, but thereafter may proceed on a course to which some class members object – NY City Bar Ass'n Formal Op. 2004-01.

a. "[W]hen conflicts of interest arise, a class lawyer must obtain informed consent from individual clients before proceeding, but so far as other class members are concerned the court may authorize the representation."

b. "[A] class lawyer may without consent undertake a representation adverse to a class member that the lawyer does not individually represent provided that representation is unrelated to the class action."

c. "[A] class lawyer may support or oppose a settlement or take other steps in the action over the objections of named plaintiffs or other class members, but must act in the best interests of the class and with appropriate disclosure to the court."

C. Potential Conflicts Among Class Members

i. Class members may disagree on:

a. Which claims the class will pursue,

b. Which parties to join during liability phase,

c. The formula by which damages will be calculated, and

d. The speed at which to make concessions during trial.

(1) *See* Deborah Rhode, *Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183 (July 1982).

ii. Conflicts within the class can defeat certification.

a. The class must satisfy Federal Rule 23(a)(4)'s requirement of fair and adequate representation so that named representatives are similarly situated to other members of the class – *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

iii. Class members can prevent a binding judgment on the class due to lack of adequate representation – Newberg on Class Actions §15:4.

iv. Class representatives, unless they have unique claims apart from those common with the class, should not obtain a disproportionate allocation from a lump sum class recovery – *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983).

v. However, some courts have allowed modest compensation to named plaintiffs for carrying the brunt of litigation – *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 877 (7th Cir. 2012); *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, No. MDL 13-02439, 2016 WL 755640, at *9 (E.D. Wis. Feb. 25, 2016); Eisenberg & Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1308 (2006).

D. Relitigating Class Certification Issue in Copycat Class Action

i. In 2011, the Supreme Court held that the Anti-Injunction Act does not permit a federal court to enjoin a state court from granting class certification in a duplicate action brought by a different named plaintiff – *Smith v. Bayer Corp.*, 131 S.Ct. 61 (2011).

ii. The Court acknowledged the force of its decision on defendant's ability to prevent relitigation of class certification and reasoned that "our legal system generally relies on principles of… comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs."

E. Common Fund Doctrine

i. Under the common fund doctrine, the plaintiff class as a whole bears the burden of attorneys' fees and only a litigant that has achieved some success on the merits is entitled to a fee – *Drazin v. Horizon Blue Cross Blue Shield of NJ, Inc.*, 832 F. Supp.2d 432, 439 (D.N.J. 2011).

a. This doctrine is meant to prevent the unjust enrichment on the part of beneficiaries of a fund at the expense of the litigants and their attorneys who helped create it.

7. OBLIGATIONS WITH REGARD TO SETTLEMENT NEGOTIATIONS

A. A lawyer may advocate a settlement he or she believes is in the best interest of the class, even if named plaintiffs and class members disagree.

i. The practicality of class actions precludes any requirement that the lawyer withdraw whenever class members disagree. – NY City Bar Ass'n Formal Op. 2004-01.

B. A lawyer's decision may not be influenced to increase his fees.

i. Any fee decision should be fully disclosed to the court – Fed. R. Civ. P. 23(e)(2); *Bowling v. Pfizer, Inc.*, 102 F.3d 777 (6th Cir. 1996).

C. Should class members disagree with settlement decisions, class counsel can withdraw from representing objecting class members and continue to represent other class members – *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999).

D. Communicating Settlement Offers Generally

i. NY Rule 4.2, which prohibits an attorney in the course of the representation of a client from communicating with a party that the lawyer knows to be represented by another attorney without prior consent or authorization by law, bars such communications in the context of settlement negotiations without exception.

a. In *Matter of Yagman*, 263 A.D.2d 151, 153, 698 N.Y.S.2d 224, 225 (1st Dep't 1999), the Court held that an attorney's conduct, including failure to communicate a settlement offer to a client, warranted suspension from practice in New York for one year. The Court held that the attorney, disciplined in California but admitted as well in New York, had acted unethically by failing to communicate a written settlement offer to his client, as well as committing various other violations. The Court stated "while there is no New York provision identical to California Rules of Professional Conduct 3-510(A) requiring an attorney to promptly communicate all settlement offers to his client, DR 7-101(A) (22 NYCRR 1200.32) [today's NY Rule 1.1(c)(1)] has been construed to impose such a duty (*see Matter of Dalton v. New York State Bar Ass'n.*, 38 A.D.2d 993, 329 N.Y.S.2d 902 *see also Matter of Dixon*, 241 A.D.2d 93, 670 N.Y.S.2d 451 and *Matter of Siegel*, 193 A.D.2d 181, 602 N.Y.S.2d 592)."

b. The Opinions Comm. on Professional Ethics of the Ass'n of the Bar of the City of New York, in its Op. 1991-2, interpreted DR 7-104(A)(1), today's NY Rule 4.2, to bar an attorney from directing his client to communicate directly with a represented adverse party, absent consent from opposing counsel. The committee reasoned that even where the client is frustrated with attorneys' inflexibility in settlement negotiations or the threat of protracted litigation, his attorney cannot counsel him to speak directly with opposing counsel's client. This is because DR 7-104(A)(1) which prohibits the attorney from communicating or "caus[ing] another to communicate" applies to causing a client to communicate directly with a represented adversary as well as causing anyone else to do so. The Committee went on to state, however, that an attorney has no duty to affirmatively discourage his client from taking the above action on his own, but may not aid in negotiating further on the client's behalf without notifying opposing counsel.

c. Note: *Rubenstein & Rubenstein v. Papadakos*, 31 A.D.2d 615 295 N.Y.S.2d 876 (1st Dep't 1968), held that even though failure of attorney to disclose settlement offers to client is an improper practice, in order to constitute a defense to an action for legal services the client must first show damages by showing that he would have accepted the offer had it been communicated to him. Likewise, clients suing attorneys for malpractice in failing to communicate settlement offers must show that they suffered_damages as a result of attorney's negligence by showing that they would have accepted settlement offer had it been communicated timely. *Cannistra v. O'Connor. McGuinness, Conte, Doyle, Oleson & Collins*, 286 A.D.2d 314, 728 N.Y.S.2d 770 (2d Dep't 2001).

E. Notice to Class Members regarding Settlement Offers

i. Comment [2] to ABA Model and NY Rule 1.4 states that a lawyer who receives a settlement offer from opposing counsel must inform the client of its substance unless the client has previously authorized the lawyer to accept or to reject the offer.

ii. The settlement agreement should outline the proposed method and procedure by which parties will notify the class – Newberg on Class Actions §12:28.

a. The final, binding decision on what notice to issue is in the discretion of the court – *Handschu v. Special Services Div.*, 787 F.2d 828, 832-33 (2d Cir. 1986); *Karic v. Major Auto. Companies, Inc.*, No. 09 CV 5708 (ENV), 2015 WL 9433847, at *11 (E.D.N.Y. Dec. 22, 2015), *report and recommendation adopted sub nom. Karic v._The Major Auto. Companies, Inc.*, No. 09CIV5708ENVCLP, 2016 WL 323673 (E.D.N.Y. Jan. 26, 2016)

F. Aggregate Settlement Rule

i. ABA Model Rule 1.8(g) states that a lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in a writing signed by the client.

a. The requirement of informed consent cannot be waived – NY City Bar Ass'n Formal Op. 2009-6.

b. Comment [13] states that lawyers representing classes of plaintiffs or defendants must follow the applicable rules on notification of class members, although the lawyer may not have a full lawyer-client relationship with all class members.

G. Division of Fees

i. NY Rule 1.5(g) states that a lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

a. The division is in proportion to the services performed by each lawyer or, by writing given to the client, each lawyer assumes joint responsibility for the representation;

b. The client agrees to employment of the other lawyer after a full disclosure of fees will be made and the client's agreement is confirmed in writing; and

c. The total fee is not excessive.

H. Restrictions on Opposing Counsel

i. Generally, plaintiff's counsel cannot agree, in connection with the settlement of disputes, to refrain from bringing, on behalf of other future plaintiffs, actions similar to the one being settled. NY Rule 5.6(a)(2) ("… a lawyer shall not participate in offering or making an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy" has been strictly interpreted to bar settlement agreements of this type, as they restrict the rights of lawyers to represent other plaintiffs.).

ii. CA State Bar Standing Comm. on the Professional Responsibility and Conduct, Op. No. 1988-104 – ruled that an attorney should not offer or accept a provision as a condition of settlement which would preclude plaintiff's attorney from subsequently suing the settling defendant. Such an agreement would violate CA Rule 5.6(a)(2) which provides: "Unless authorized by law, a lawyer shall not participate in offering or making an agreement that imposes a restriction on a lawyer's right to practice in connection with a settlement of a client controversy, or otherwise."

iii. *But see: Feldman v. Minars*, 230 A.D.2d 356, 357, 658 N.Y.S.2d 614, 615 (1st Dep't 1997). This Court disqualified a plaintiff's counsel from representation because such representation violated a settlement agreement in a prior action barring counsel from participating in any future action against the settling defendants. The Appellate Division reversed the lower court decision, which held the settlement agreement unenforceable as against public policy and in violation of DR 2-108(B), or today's NY Rule 5.6(a)(2). The Appellate Division said the settlement agreement did not violate public policy.

a. The Opinions Comm. on Professional Ethics of the Ass'n of the Bar of the City of New York, as well as several other bar committees, has come out in strong opposition to such agreements under the conclusion that they violate DR 2-108(B), or today's NY Rule 5.6(a)(2). A July, 2000, Op. No. 730 interpreted the purpose of DR 2-108(B) as threefold: "(1) to preserve the public's access to lawyers who, because of their background and experience, "might be the best available talent to represent these individuals," (2) to prevent parties from "buying off" the opposing lawyer, and (3) to prevent a conflict between a lawyer's present client and the lawyer's future ones. ABA Op. 93-371 (1993). The committee interpreted the rule to apply equally to both attorneys who propose such agreements and attorneys who accept them.

b. In a March, 1999 opinion, No. 1999-3, the Ass'n of Bar of the City of New York Opinions Comm. on Ethics stated its disagreement with the Feldman decision, siding with the ABA and several other New York bar associations in the belief that DR 2-108(B) prohibits such settlement agreements. The Committee concluded that covenants by an attorney not to bring suit in the future against the defendants in a settlement clearly violate the meaning and intent of DR 2-108(B) to bar any agreement that restricts an attorney's right to practice law.

c. *But see:* In *Blue Cross and Blue Shield of New Jersey v. Philip Morris, Inc.*, 53 F.Supp.2d 338, 342 (E.D.N.Y. 1999), a federal court held that an agreement where one law firm promised not to represent a client against defendants in exchange for defendants' refraining from disputing such representation in other forums was valid and would not be held unenforceable under DR 2-108(B). Federal courts are controlled by federal law in interpreting ethics rules as they apply to conduct of attorneys appearing in federal court. The court disqualified the law firm from representation, relying on Cannon 9, of the New York Code of Professional Responsibility to disqualify the firm for failing to avoid the appearance of impropriety rather than relying on DR 2-108(B).

(1) The Court said that DR 2-108(B) had been criticized as "illogical and bad policy" (*Feldman*, 230 A.D.2d at 360, 658 N.Y.S.2d at 617, adopting Professor Gillers' view, Stephen Gillers, *A Rule Without Reason*, 790 Oct. A.B.A.J. 118 (1993), and that the only New York Court of Appeals decision on the subject, *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95, 106 n.2, 550 N.E.2d 410, 416, 551 N.Y.S.2d 157, 163 (1989), which prohibited agreements baring attorneys from representing clients, was not controlling in federal court, and thus the agreement was valid.

I. <u>Waiver of Right to Collect Fees</u>

i. It is not unethical for attorneys to agree to settlements conditioned on waiver by plaintiffs of attorneys' fees authorized by civil rights and civil liberties class actions. This principle marks a change in thinking in New York which was sparked by a 1986 Supreme Court Decision regarding attorney waiver of fees in connection with settlement. The Opinions Comm. on Professional Ethics of the Ass'n of the Bar of the City of New York, has withdrawn two of its prior opinions in response to this Supreme Court ruling.

ii. In *Evans v. Jeff D.*, 475 U.S. 717, 728, 106 S.Ct. 1531, 1538 (1986), Justice Stevens delivered the 6-3 opinion of the Court, which held that the Civil Rights Attorney's Fees Awards Act of 1976 does not bar attorneys from proposing or entering into settlement agreements that include provisions for waiver of attorneys' fees. The Court stated that District Court approvals of such settlements do not involve any breach of ethical duties by attorneys and should not be overturned on such grounds.

iii. The May 13, 1987 opinion of The Opinions Comm. on Professional Ethics of the Ass'n of the Bar of the City of New York, withdrawing the Committee's two prior opinions on this issue, 80-94 and 82-80, relies on the decision in *Jeff D.* The Committee acknowledged that these prior decisions consisted of heavy dissent. In *Jeff D.*, Justice Stevens stated "while it is undoubtedly true that Congress expected feeshifting to attract competent counsel to represent citizens deprived of their civil rights, it neither bestowed fee awards upon attorneys nor rendered them nonwaivable or nonnegotiable; instead, it added them to the arsenal of remedies available to combat violations of civil rights, a goal not invariably inconsistent with conditioning settlement on the_merits on a waiver of statutory attorney's fees." 475 U.S. at 731-32, 106 S.Ct. at 1539-40. The Committee had relied on DR 1-102(A)(5) (today's NY Rule 8.4), EC 2-25, and EC 7-14, in its original opinion holding such settlement agreements unethical.

iv. Note: Ops. 80-94 and 82-80, withdrawn by the Committee in its Op. 1987-4, both dealt with attorneys' fees in the context of large civil rights litigations, which often involve a plaintiff's counsel being employed by public interest organizations. This situation is analogous to class action suits, both of which may involve attorneys who will depend entirely upon contingency or statute for fees. Indeed, the Supreme Court decision in *Jeff D.* was a class action suit. In the 80-94 opinion, the committee relied on this fact stating that defense counsel are "in a uniquely favorable position when they condition settlement on the waiver of the statutory fee: They make a demand for a benefit which the plaintiff's lawyer cannot resist as a matter of ethics and which the plaintiff will not resist due to lack of interest." Presumably, this dilemma is no longer a concern in either statutory civil rights cases or class action cases, in light of the Supreme Court decision in *Jeff D.* and the Committee opinion in 1987-4.

v. However, California allows attorneys to contract with clients in civil rights cases not to waive right to collect fees. *See* California State Bar Standing Comm. on Professional Responsibility and Conduct Op. No. 1994-136 finding that a lawyer does not violate the rules of professional conduct if he contracts with a client that the right to recover attorney's fees pursuant to civil rights statutes belongs to the attorney and may not be waived by the client.

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