2023

The Business of Securities Class Action Lawyering

Jessica M. Erickson
University of Richmond - School of Law, jerickso@richmond.edu

Stephen J. Choi

Adam C. Pritchard

Recommended Citation

THE BUSINESS OF SECURITIES CLASS ACTION LAWYERING

Stephen J. Choi, Jessica M. Erickson, and A.C. Pritchard[*]

Plaintiffs' lawyers in the United States play a key role in combating corporate fraud. Shareholders who lose money as a result of fraud can file securities class actions to recover their losses, but most shareholders do not have enough money at stake to justify overseeing the cases filed on their behalf. As a result, plaintiffs' lawyers control these cases, deciding which cases to file and how to litigate them. Recognizing the agency costs inherent in this model, the legal system relies on lead plaintiffs and judges to monitor these lawyers and protect the best interests of absent class members. Yet there is remarkably little data on the business of securities class action lawyers, leaving lead plaintiffs and judges to oversee this area without the tools to understand how it works.

This Article looks inside the black box of securities class action lawyering to explore the business behind these cases. Our study includes hand-collected data on all securities fraud class actions against public corporations filed between 2005 and 2018, a total of nearly 2500 cases. We find that the business of securities class action lawyering is far more complex than prior scholarship has recognized. Contrary to conventional wisdom, there are not two tiers of plaintiffs' law firms; instead, there are multiple tiers of firms, each with its own client base, litigation patterns, and revenue model. Our study gives lead plaintiffs and judges the data and tools they need to understand these tiers and to compare the performance of the law firms within them. We also examine how these law firms are compensated, finding that judges' fee awards fail to account for the difficulty of cases or the risk of non-recovery in any systematic way. These fees are crucial to ensuring that law firms pursue the right cases on behalf of shareholders, so we suggest ways that judges can use data to improve fee awards. As we will see, the path to reforming securities class actions starts with understanding the business behind them.

TABLE OF CONTENTS

INTRODUCTION

When it comes to litigating corporate fraud, the lawyers are in charge. Shareholders who lose money to fraud can file securities class actions to recover their losses.[1] These lawsuits result in billions of dollars in settlements each year, more than any other type of class action.[2] Yet these settlements are divided among a large number of shareholders, and most shareholders do not have enough money at stake to justify monitoring these cases.[3] As a result, their lawyers often function as entrepreneurs, choosing which securities class actions to file and controlling nearly all strategic decisions in these suits.[4]

The upside of this arrangement is that even shareholders with small claims have their day in court, but it also creates agency costs. Freed from meaningful client constraint, lawyers can file cases for their nuisance value.[5] They can settle cases prematurely.[6] They can even structure settlements and fee awards to benefit themselves at the expense of the shareholder class.[7] To address these concerns, Congress passed the Private Securities Litigation Reform Act ("PSLRA"),[8] giving lead plaintiffs and judges more control over the law

---

[1] *See, e.g.*, Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 313 (2007) ("This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions...").

[2] *See* SECURITIES CLASS ACTION SETTLEMENTS: 2021 REVIEW AND ANALYSIS, Cornerstone Research, at 3 (finding that there was a total of $36.7 billion in securities class action settlements between 2012 and 2021); Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEG. STUD. 811 (2010) (finding that securities class actions "comprise the majority of the money—indeed, the vast majority of the money—involved in class action settlements").

[3] *See* Hillary A. Sale, *Judges Who Settle*, 89 WASH. U.L. REV. 377, 384 (2011) ("The representative plaintiffs arguably have investments insufficient to ensure active monitoring of the class lawyers' performance or much, if any, participation in the litigation other than what is required. The stakes also are too small to ensure they monitor their attorneys' fees.").

[4] *See* John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288 (2010) ("In the United States, class actions have long been organized around an entrepreneurial model that uses economic incentives to align the interest of the class attorney with those of the class.").

[5] *See* H.R. 104-369 (stating that Congress heard evidence regarding "the manipulation by class action lawyers of the clients whom they purportedly represent"); S. Rep. 104-98 ("The settlement value to defendants [in securities class actions] turns more on the expected costs of defense than the merits of the underlying claim.").

[6] *See* S. Rep. 104-98 ("The lawyers can decide when to sue and when to settle, based largely on their own financial interests, not the interests of their purported clients.").

[7] *See, e.g.*, H.R. 104-369 (stating that courts could be more confident settlements negotiated under the supervision of institutional plaintiffs were `fair and reasonable' than is the case with settlements negotiated by unsupervised plaintiffs' attorneys*").

[8] Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4.

firms that file these cases.[9] The promise of the PSLRA was that it would reform securities class actions by encouraging institutional investors with larger financial losses to serve as lead plaintiffs and empower lead plaintiffs and judges to supervise settlements and fee awards.[10]

There is just one problem: the lead plaintiffs and judges tasked with reining in these agency costs do not know enough about the agents to actually do it. Effectively overseeing the lawyers in securities class actions requires data on the business behind these lawsuits. In selecting lead counsel, for example, lead plaintiffs need to know which firms are better than others in recovering money for shareholders.[11] Similarly, in awarding attorneys' fees, courts need to encourage the future filing of meritorious cases without giving the attorneys a windfall.[12] Lead plaintiffs and judges need data to realize the promise of the PSLRA, and by and large, they do not have it.

To date, there has been little empirical evidence available about the business of securities class action lawyering. Early scholarship on class action litigation relied on general observations about the law firms behind these lawsuits, rather than systematic empirical research.[13] More recent studies examined law firm behavior in particular time

---

[9] *See* S. Rep. 104-98 (stating that the PSLRA "contains several provisions to transfer primary control of private securities litigation from lawyers to investors"); Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1493 (2006) (stating that the PSLRA "sought to ratchet up judicial supervision of lawyers").

[10] *See, e.g.*, 15 U.S.C.A. § 78u-4(a)(3)(B)(v) ("The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class."); 15 U.S.C.A. § 78u-4(a)(6) ("Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.").

[11] *See, e.g.*, Soto v. Hensler, 235 F. Supp. 3d 607, 624 (D. Del. 2017) (discussing the factors relevant to the lead counsel decision, including "the qualifications and experience of counsel selected by the lead plaintiff").

[12] *See* Pennsylvania Pub. Sch. Employees' Ret. Sys. v. Bank of Am. Corp., 318 F.R.D. 19, 25 (S.D.N.Y. 2016) ("[P]ublic policy encourages the award of reasonable attorneys' fees to ensure that such cases find their way to court. However, courts must also "guard against providing a monetary windfall to class counsel to the detriment of the plaintiff class.").

[13] *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 681 (1986) (discussing what "happens when client control is so weak as to make the attorney virtually an independent entrepreneur"); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 12 (1991) (discussing the role of the entrepreneurial attorney in class action litigation through the lens of "economic theory of agency costs"). Some of this work does cite empirical studies of cases, but not of the law firms or their business models.

periods or subsets of cases,[14] but there has been no large-scale study of the business models of law firms that file securities class actions. As a result, lead plaintiffs and judges cannot determine how these law firms differ in the cases that they pursue or the results that they achieve.

This Article presents the largest academic study of the business of securities class action lawyering. Our study uses hand-collected data from the case records of every securities fraud class action filed against a public company between 2005 and 2018—nearly 2500 lawsuits involving more than 700 law firms. With this data, we can better understand the plaintiffs' law firms that file securities class actions, offering an in-depth analysis of their client relationships, filing patterns, and revenues over more than a decade. These data provide concrete guidance for judges and lead plaintiffs as they select and monitor these law firms.

Our study reveals three important insights. First, this business is more complex than the literature has recognized. Prior scholarship divided plaintiffs' law firms into two categories—those that filed the largest securities class actions and everyone else.[15] Our study maps a more complicated ecosystem of plaintiffs' law firms. We find that the law firms that lead securities class actions fall into different tiers, each using different types of clients, targeting different types of corporate wrongdoing, and relying on different revenue models. We also find a previously unrecognized category of firms playing secondary roles in these cases, including many that appear to connect lead counsel firms with investors willing to serve as lead plaintiffs.

Second, drilling down into these diverse business models reveals substantial variation in the results these law firms achieve for shareholders. In their sales pitches to lead plaintiffs and judges, law firms trumpet their largest settlements, but we find that these cases are often outliers when compared to the typical cases in firms' portfolios. Our data instead highlights specific metrics that lead plaintiffs and judges can use to compare law firms going forward.

---

[14] *See, e.g.*, Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1512 (2006) (analyzing approximately 400 securities class actions filed pre- and post-PSLRA to "assess how the PSLRA affected the practices of plaintiff law firms"); Matthew D. Cain et. al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 607 (2018) (discussing the plaintiffs' law firms that file merger objection litigation). There has also been valuable research on the role of plaintiffs' attorneys in other types of representative corporate lawsuits. *See, e.g.*, Bernard Black, Brian Cheffins, & John Armour, *Delaware Corporate Litigation and the Fragmentation of the Plaintiff's Bar*, 2012 COLUMBIA BUS. L. REV. 427.

[15] John C. Coffee, Jr., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE, at 81.

Finally, we find that that judges' fee awards consistently fail to account for firm performance or risk in any systematic way. Fee awards are supposed to reward law firms for the results they achieve, while also compensating them for the risk inherent in contingency fee litigation. Yet our analysis suggests that judges base their awards largely on the size of the settlement, rather than factors that reflect the law firms' own contributions and risk. Judges are impressed by large settlements, but they are less inclined to look behind the settlements to figure out how much credit the law firms deserve for achieving them.

We build on these empirical observations by proposing reforms at two stages of the litigation process. At the front end, we provide a framework for the selection of lead counsel. Lead plaintiffs and judges are charged with selecting lead counsel, but they are not experts in securities class actions and they have limited time to devote to oversight of these cases. We therefore offer a list of specific questions that lead plaintiffs and judges can use to evaluate competing law firms. These questions are based on our empirical findings and would allow lead plaintiffs to focus on firms' relative performance, while giving judges the information they need to uncover potential conflicts of interest.

At the back end, we suggest changes that would bring more analytical rigor to the fee award process. When deciding on a fee award, judges should request standardized information from the law firms, including relevant data from comparable cases and details about the law firms' own work on the cases. We explain how judges can use this information to set fee awards that reflect law firm performance and risk. Taken as a whole, these reforms would improve the ability of lead plaintiffs and judges to hire and compensate securities class action law firms.

This study lays a foundation for future empirical work on other types of class actions. Securities class actions are the most common type of class action,[16] but the United States uses class actions to enforce a variety of other laws that protect the public, from labor and employment law to consumer fraud and civil rights laws.[17] Although law firms typically specialize in particular types of class actions, similar agency costs and oversight challenges

---

[16] *See* Fitzpatrick, *supra* note 2, at 10 (finding that securities class actions comprise a larger percentage of class action settlements approved by federal judges than any other type of class action).

[17] *See id.* (discussing the most common types of class actions settlements in federal court).

affect other areas of law.[18] Scholars can build on the methodology employed here to examine the business behind these other types of class actions.

We proceed as follows. In Part I, we detail the black box of securities class action lawyering, highlighting gaps in the information available on law firm business models, their relative performance, and fee awards. Part II describes our study methodology. Parts III and IV present our empirical results. In Part III, we classify and analyze law firms' roles and their litigation portfolios. In Part IV, we provide data to aid lead plaintiffs and judges in selecting lead counsel and making fee awards. Part V outlines our suggested reforms. A brief conclusion offers proposals for further research.

I.   THE BLACK BOX OF SECURITIES CLASS ACTION LAWYERING

The lack of data on securities class action lawyering is a significant hurdle in the legal system's efforts to protect class members. Although scholars have long theorized about how plaintiffs' law firms manage their caseloads and revenues, there has been little empirical study into how this business actually works. This empirical gap has consequences for practice. Although the law relies on lead plaintiffs and judges to monitor the law firms that file these cases, neither group has the information they need to perform these roles effectively. This Part first explores the data gaps regarding law firms' case portfolios, before turning to the lack of data relating to the quality of individual law firms and fee awards.

A. Business Models of Law Firms

Understanding the business models of plaintiffs' attorneys in securities class actions is important because these lawsuits are a double-edged sword.[19] The Supreme Court has said that these lawsuits are "a most effective weapon in the enforcement" of the federal securities laws.[20] The Court has also expressed concern, however, that securities fraud class actions "present[] a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general."[21] Similarly, Congress has called securities class actions "an indispensable tool with which defrauded investors can recover their losses,"[22] while at

---

[18] *See* Macey & Miller, supra note 13, at 3 (discussing broadly how "plaintiffs' class and derivative attorneys function essentially as entrepreneurs who bear a substantial amount of the litigation risk and exercise nearly plenary control over all important decisions in the lawsuit").

[19] *See, e.g.*, Coffee, *supra* note 13; Macey & Miller, *supra* note 13.

[20] Randall v. Loftsgaarden, 478 U.S. 647, 664 (1986).

[21] Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 80 (2006) (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739 (1975)).

[22] H.R. Conf. Rep. No. 104–369, p. 31 (1995).

the same time implementing restrictions in the PSLRA to "curtail the filing of abusive lawsuits."[23]

These dueling narratives reflect the inherent conflicts in the business model of securities class actions. In other types of civil lawsuits, plaintiffs control litigation filed on their behalf, and they often have a good deal at stake.[24] They decide if they want to file suit, select their attorney, and oversee their attorney's actions throughout the litigation. In securities class actions, however, as in other kinds of representative litigation, class members rarely have sufficient incentives to monitor their attorneys. These lawsuits are opt-out, which means that shareholders who are class members may not know about the class action until it is settled.[25] Many shareholders also may not have enough money at stake—because they are entitled to only a small percentage of the class recovery—to justify investing significant time and energy in understanding and monitoring the case.[26] Additionally, shareholders are a diffuse group who face organizational barriers to getting involved in these cases. As a result, plaintiffs' lawyers typically function as entrepreneurs in class actions, selecting the cases to be filed and controlling nearly all decisions and strategy, up to and including the decision to settle and on what terms.[27]

Given the lack of meaningful client oversight, these law firms have room to make decisions that benefit themselves at the class's expense. For example, law firms can file frivolous cases or settle meritorious cases prematurely.[28] They can also structure the settlement and fee award in a way that maximizes their own fees at the expense of the class's recovery.[29] Fee awards are subtracted from the settlement, so every extra dollar for the attorneys means one less dollar for shareholders. These agency costs are the impetus behind

---

[23] S. REP. 104-98.

[24] *See, e.g.*, Jessica Erickson, *The Gatekeepers of Shareholder Litigation*, 70 OKLA. L. REV. 237, 241 (2017).

[25] *See* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1535 (2004).

[26] *See* Macey & Miller, *supra* note 13, at 20 (1991).

[27] *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882–83 (1987) ("[I]t is more accurate to describe the plaintiff's attorney as an independent entrepreneur than as an agent of the client.").

[28] John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 390–91 (2000) (arguing that plaintiffs' attorneys and class members will have different risk preferences that could lead to difference preferred litigation strategies).

[29] Cain et al., *supra* note 14, at 607 (explaining the possibility of "collusion" between plaintiffs' attorneys and defendants in crafting settlements in merger litigation).

a variety of rules discussed below empowering lead plaintiffs and judges to monitor class counsel.[30]

This monitoring is made more difficult, however, by the dearth of empirical evidence on the business models of these law firms. Legal scholarship has developed a theoretical understanding of this practice area, but this understanding relies on observational and anecdotal accounts rather than systematic empirical study. Prior work on lawyer behavior in class action lawsuits illustrates this point. Scholars have theorized that there are two basic types of law firms that file securities class actions. John Coffee, for example, has posited that a handful of law firms are on what he called the "megatrack."[31] These firms maintain a large stable of institutional investor clients, file a significant number of cases, and regularly achieve settlements in excess of $100 million.[32] Most firms, however, file smaller cases.[33] These firms typically have clients who are individuals or smaller institutions, and they invest less time and attorney hours in their cases, and their goal is to reach a quick settlement before investing much money into the case.[34]

Scholars also developed the portfolio model of litigation, theorizing that plaintiffs' attorneys make litigation decisions in individual class actions or other aggregate lawsuits in light of their overall caseload.[35] This model was used explain why law firms make decisions that may seem irrational in individual cases. For instance, plaintiffs' attorneys with a diversified portfolio of cases can rationally pursue cases with a low likelihood of success but a large possible recovery.[36] This strategy would be untenable for firms that do not have a significant number of cases over which to spread out the risk of non-recovery.

Overall, this literature has provided greater theoretical understanding of the agency costs that have long been recognized in securities class actions, but these theories have not

---

[30] *See e.g.*, Fed. R. Civ. P. 23 (requiring court approval of class action settlements).

[31] *Id.*

[32] Other scholars have called these firms the "Tier 1 firms." *See* Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA,* 106 COLUM. L. REV. 1489, 1525 (2006) (demonstrating that "Tier 1 firms" are more likely to associate with firms in lower tiers after the enactment of the PSLRA). Choi and Thompson briefly outline five tiers of law firms, but their empirical tests focus on comparing Tier 1 firms with non-Tier 1 firms. *See id.*

[33] John C. Coffee, Jr., ENTREPRENEURIAL LITIGATION: ITS RIDE, FALL, AND FUTURE, at 81.

[34] *Id.*

[35] *See* Coffee, *supra* note 13, at 677 (1986) (arguing that plaintiffs' attorneys are "utility-maximizing entrepreneur[s] who manage[] a portfolio of actions and thus make[] litigation decisions in an individual case based upon their overall impact on the portfolio"); Macey & Miller, *supra* note 13, at 17–18 .

[36] *See* Coffee, *supra* note 13, at 705 (1986).

been tested empirically.[37] As a result, we do not know how law firms actually create their litigation portfolios or how law firms differ in their strategies for recruiting clients and filing cases, choices that could influence lawyers' decisions in individual cases. Without understanding these business models, the legal system will struggle to provide incentives for entrepreneurial litigation while also minimizing its risks.

B. Law Firm Quality

There is also little comparative data on the performance of the law firms that represent shareholders in securities class actions. The first task in nearly every securities class action is to select one or more law firms to serve as lead counsel. The PSLRA gives lead plaintiffs the primary responsibility for selecting lead counsel, stating that they shall "select and retain counsel to represent the class."[38] It also states, however, that their selection is "subject to the approval of the court,"[39] creating a role for judges to oversee this process.

The PSLRA is silent on how lead plaintiffs and judges should carry out their respective responsibilities. Congress seems to have imagined that lead plaintiffs would step seamlessly into their new roles, with little thought given to the logistical challenges they might face. Yet many investors do not have sufficient information about the market for plaintiffs' law firms to hire and monitor them effectively. Lead plaintiffs can be institutions or individuals, and they vary in their approach to selecting lead counsel. The largest institutional investors have established procedures based on detailed Requests for Proposals ("RFPs"),[40] but these RFPs vary in their rigor. Some RFPs, for example, require the bidding firms to list all of the cases in which their firm has served as lead counsel over the last several years, as well as the outcomes.[41] This type of request allows the institution to

---

[37] Outside of the class action context, Professor Elizabeth Burch has examined leadership structures in MDL litigation, finding that these cases often involve a complex leadership structure of plaintiffs' law firms that can include a steering committee, liaison committee, fee allocation committee, and discovery committees. *See* Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1459 (2017). As discussed in Part III(A) below, the law firm networks in securities class actions are not as complex, likely because these suits frequently settle prior to discovery and do not involve individual adjudication of plaintiffs' claims.

[38] 15 U.S.C.A. § 78u–4(a)(3)(B)(v).

[39] *Id.*

[40] *See, e.g.*, Request for Proposals: Securities Litigation Monitoring, Evaluating, and Reporting, Office of the Illinois State Treasurer (May 20, 2020); Kansas Public Employees Retirement System Request for Proposals (Dec. 30, 2021); Securities Litigation Portfolio Monitoring and Securities Litigation Services Request for Proposals, Retirement System Investment Commission of South Carolina (Oct. 30, 2017).

[41] Kansas Public Employees Retirement System Request for Proposals (Dec. 30, 2021) (asking bidding firms to "specify in detail . . . the name or style of case, docket number and

8

evaluate the firm's entire portfolio, rather than a handful of cases that the firm highlights. Some institutions also ask about the firm's planned fees,[42] a key topic given that these fees come directly out of any recovery for the class.[43]

Some RFPs, however, do not ask even these basic questions. Instead, these RFPs ask generic questions that are unlikely to help the fund choose the best law firm. As an example, an RFP that simply asks bidding firms to identify a few past cases will invite law firms to highlight their successes,[44] but will not tell the fund anything about the law firm's overall track record. Similarly, some RFPs ask detailed questions about the bidding law firms' approach to securities litigation,[45] while others ask no questions at all on this topic.[46] Many RFPs do not ask the firms for any information about their fees.[47] Many funds also want the bidding firms to monitor their investment portfolio for potential litigation opportunities, and their RFPs focus on these services.[48] Law firms typically offer these services free of charge

---

jurisdiction if applicable, and current status of cases and matters in which the firm's clients have been represented or counseled relative to the PSLRA).

[42] *Compare* Proposal to Provide Securities Litigation Counsel to the State Board of Administration of Florida Submitted by Bernstein Litowitz & Grossman LLP, at 15 ("Please provide historical data related to fees awarded when serving as Lead Plaintiff for securities class action litigation and fees otherwise paid in individual or opt-out or derivative litigation.") *with* Norfolk County Retirement System Portfolio Monitoring & Securities Litigation Services Request for Proposals (Sept. 7, 2021) (not requesting fee information).

[43] For example, the Securities Litigation Policy of the Chicago Teachers' Pension Fund specifically states that bidding firms "must demonstrate a commitment that any proposed case with multiple lead plaintiffs or with multiple law firms acting as lead plaintiff's counsel must be in the best interest of the Fund and that the Fund's negotiated fee arrangement shall, if lower, prevail over any other fund's negotiated fee arrangement." Chicago Teachers' Pension Fund, Securities Litigation Policy (Oct. 21, 2021), at https://www.ctpf.org/sites/files/2021-10/Securities%20Litigation%20Policy%2010.21.21.pdf.

[44] *See, e.g.*, Plymouth County Retirement Association Portfolio Monitoring & Securities Litigation Services Request for Proposals (RFP) (Oct. 19, 2017) (asking bidding firms to "provide a representative listing of securities litigation matters in which your firm within the past five (5) years has achieved favorable outcomes").

[45] *See, e.g.*, Alameda County Employees' Retirement Association Request for Proposal: Securities Litigation Counsel Services (July 1, 2013) (asking bidding firms to "[d]escribe the resources that your firm utilizes to identify possible claims and actions" and [d]escribe the key issues that ACERA should consider when determining if it should consider lead plaintiff status").

[46] *See, e.g.*, School Employees Retirement System of Ohio Request for Quotation: Securities Litigation (April 2019).

[47] It is possible that these institutional investors enter into private agreements regarding fees after they have selected a law firm, but this discussion could come too late if the investor has already selected the firm to serve as putative lead counsel. *See, e.g.*, Lynn A. Baker et. al., *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1394 (2015) ("Plaintiffs' attorneys said in informal interviews that, in their experience, some form of ex ante fee agreement is present in virtually all cases with public pension funds.").

[48] *See, e.g.*, San Bernardino County Employees' Retirement Association Request for Proposals for Securities Litigation Monitoring, Evaluation, and Reporting Services (July 15, 2016).

hoping that the institutions will reward them with a lead counsel appointment if the firm identifies a promising lawsuit. These arrangements, while common, mean that many RFPs focus primarily on the firm's technical capability to perform the monitoring services, rather than their litigation results.[49]

Moreover, despite the PSLRA's focus on institutional investors, individuals still serve as lead plaintiffs in a majority of cases,[50] and they are often recruited by lawyers through Internet advertising.[51] When recruiting individuals to serve as lead plaintiffs, law firms will often publish a flurry of identical internet press releases announcing an investigation and asking shareholders who have lost money in the target company's stock to contact them.[52] This approach is essentially the opposite of the RFPs used by larger institutional investors, as the law firms in these smaller cases advertise for clients, rather the other way around. Although little data on this process exists, it does not suggest that these individual investors are comparing law firms or carefully selecting their attorney.

Even with these various selection processes, no investor has all the information they need to make an informed selection of their lead counsel. The most detailed RFP will only provide information about the bidding law firm, not the market as a whole.[53] Investors trying to evaluate a law firm's record do not have the data necessary to compare an individual law firm's record with other firms in the market.[54] Imagine, for example, that an investor is

---

[49] Institutional investors should be capable of running a selection process that results in a qualified law firm in the lead counsel role, as they are used to hiring outside law firms and have developed internal processes to guide their selection *See* Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 708 (2002) (using interview data to demonstrate that some institutions "convey a nuanced sense of the importance of firm expertise, describing the selection process in terms of the best firm for a particular case").

[50] In our study, 56.3 percent of cases did not include any institutions as lead plaintiff.

[51] Law firms often distribute a flurry of press releases over the Internet to attract potential plaintiffs. *See, e.g.*, Order Granting Consolidation, Appointing Lead Plaintiff, and Appointing Lead Counsel, Staublein v. Acadia Pharmaceuticals, Inc., Case No. 18-cv-01647, S.D. Cal. Feb. 26, 2019), at 5 (referencing an alleged "lawyer-driven solicitation campaign" that involved "thirty-one separate press releases" distributed over the Internet to recruit a shareholder willing to serve as lead plaintiff).

[52] *See* Elliott J. Weiss, *The Lead Plaintiff Provisions of the PSLRA After A Decade, or "Look What's Happened to My Baby"*, 61 VAND. L. REV. 543, 561 (2008) (explaining that, following the enactment of the PSLRA, "plaintiffs' attorneys realized that they could use an Internet notice that they had filed a class action to 'troll' for potential clients").

[53] The most conscientious institutional investor may be able to piece together this market-wide information by soliciting and then reviewing RFP responses from a variety of firms, but this obviously takes a significant amount of time and effort.

[54] A few economic consulting firms publish semi-annual reports on securities class actions that include descriptive statistics on settlements and fee awards. *See, e.g.*, Cornerstone Research, Securities Class Action Filings: 2021 Year in Review, at https://www.cornerstone.com /insights/reports/securities-class-action-filings/. These reports, however, focus on cases rather

trying to evaluate a law firm that reports a 60 percent settlement rate with a $15 million average recovery. Without additional context, it is difficult for a lead plaintiff to know what to make of this record. Is the law firm one of the top firms in this industry, or is it simply one among many with similar outcomes? These data gaps create challenges even for investors who are willing to devote considerable time and energy to selecting a law firm.

After the lead plaintiff has selected one or more law firms to serve as lead counsel, the judge must review and approve this choice. Judges, however, have even less information than lead plaintiffs when they are conducting their review. The motions filed by the applicants focus on their qualifications to serve as *lead plaintiff*, typically providing very little information about the law firms seeking to serve as *lead counsel*.[55] The firms may include a firm biography with the backgrounds of their attorneys and highlights of their best cases,[56] but firms are not required to provide a representative list of cases or any other specific information. Based on the information submitted, a judge cannot evaluate where a particular firm falls vis-à-vis their competitors when it comes to securing meaningful recoveries for shareholders. As a result, while the PSLRA charges lead plaintiffs and judges with selecting a law firm to serve as lead counsel, it does little to ensure that they have the information they need to carry out these roles effectively.[57]

C. Law Firm Fees

Judges are responsible for setting the appropriate fee if the plaintiffs' attorneys achieve a recovery for the shareholder class.[58] Setting the fee correctly is critical for aligning the incentives of the lawyer with the interests of the class members. If the fee is too low, law

---

than law firms and therefore are of limited assistance to investors and judges trying to compare a specific law firm to other firms in the market.

[55] *See, e.g.*, Memorandum in Support of Panthera Investment Fund L.P.'s Motion for Appointment as Lead Plaintiff and Approval of Lead Plaintiff's Selection of Lead Counsel, Prodanova v. H.C. Wainwright & Co., LLC, No. 2:17-cv-7926 (C.D. Cal. Dec. 29, 2017) (spending 10 pages describing the case and the proposed lead plaintiff's qualifications and less than 1 page describing the proposed lead counsel's qualifications).

[56] *See, e.g.*, Memorandum of Points and Authorities in Support of Motion of GE Investor Group for Appointment as Lead Plaintiff and Approval of Counsel, Hachem v. General Electric, Inc., No. 17-cv-08457 (S.D.N.Y. Jan. 2, 2018) (spending less than a page in the brief on the proposed lead counsel's qualifications, but attaching a 46-page firm biography listing case highlights and attorney biographical information).

[57] *See* Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 656 (2002) ("Although courts pay lip service to the proposition that counsel must provide representation of sufficient quality to satisfy the requirements of Fed. R. Civ. P. 23, courts rarely go beyond superficial efforts to assess quality.").

[58] *See* In re Nortel Networks Corp. Sec. Litig., 539 F.3d 129, 134 (2d Cir. 2008) (holding that the amount of attorneys' fees awarded in securities class actions falls within the discretion of the district court).

firms will not have sufficient incentive to invest time and energy in the litigation, potentially limiting recovery.[59] If the fee is too high, law firms will receive a windfall at the expense of the shareholder class.[60] As a result, setting the right fees is not just about compensating the attorneys for their time. At the most fundamental level, it is about creating a sustainable business model that protects absent shareholders and gives attorneys the right incentives to file and pursue meritorious securities class actions.

Judges have considerable discretion in determining fee awards.[61] The PSLRA limits fees to a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."[62] In setting this percentage, most courts will consider, among other factors, the quality of representation and the risk of non-recovery.[63] They also typically do a "lodestar cross-check," comparing the requested fee to the firms' lodestar, that is, hours spent on the litigation multiplied by the lawyers' hourly rates.[64] This cross-check is designed to ensure that the award appropriately compensates the law firm for their investment in the case without providing a windfall.[65] The fee awarded will typically include a multiplier to the lodestar number to reflect the risk of non-recovery.

Although judges have the final decision on the fee award, lead plaintiffs can provide input to the court. In many cases, this input is minimal, with the lead plaintiff simply submitting an affidavit to the court stating that it supports the requested fee.[66] Sophisticated institutional investors, however, may negotiate an ex ante fee agreement when selecting lead

---

[59] *See* Hicks v. Morgan Stanley, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005). (recognizing that securities class actions "could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class").

[60] *See* In re Enron Corp. Sec., Derivative & ERISA Litig., 586 F. Supp. 2d 732, 751 (S.D. Tex. 2008) (stating that one of the goals in setting attorneys' fees is to "avoid windfall fees").

[61] *See* In re Nortel Networks Corp. Sec. Litig., 539 F.3d 129, 134 (2d Cir. 2008).

[62] 15 U.S.C.A. § 78u-4(a)(6).

[63] Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000) (listing the factors that federal courts should consider in setting attorneys' fees under the PSLRA).

[64] *Id.* ("Indeed, we encourage the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage.")

[65] *See* In re Cendant Corp. Sec. Litig., 404 F.3d 173, 188 (3d Cir. 2005) (stating that the purpose of a lodestar cross-check is to "ensure that the percentage approach does not lead to a fee that represents an extraordinary lodestar multiple").

[66] *See* Lynn A. Baker et. al., *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1394 (2015) (stating that in 34.65 percent of the cases, "attorneys noted in their fee-request filings that the lead plaintiff supported the requested fee, often without any discussion of whether that support was premised on an ex-ante fee agreement").

counsel.[67] Although a court is not bound by these agreements, courts often take them into account.[68] As a result, lead plaintiffs can also play an important role at the fee award stage.

Again, however, judges and lead plaintiffs do not have the information they need to set fees.[69] As noted above, the PSLRA instructs courts to award fees as a percentage of the total settlement amount.[70] Law firms can cite the fee percentages awarded in other cases as precedent, but they cherry pick cases with high fee percentages. For example, it is common for these motions to cite cases in which the court awarded lead counsel 30 percent or more of the settlement fund,[71] even though such fees are unusual in securities class actions, especially in cases involving larger settlements.[72] Without more comprehensive data, however, judges and lead plaintiffs may not know that these precedents are outliers.

The same challenges confront courts conducting a lodestar cross-check and choosing a multiplier for this lodestar. The multiplier is designed to compensate plaintiffs' law firms for the risk of non-recovery in these cases. Choosing a multiplier that adequately reflects this risk is a challenging task in general, but it becomes especially daunting if the judge attempts to consider the facts of a particular case. Law firms frequently reference the fact that approximately half of all securities class actions are dismissed,[73] but this overall statistic does not reflect the risk of the specific case before the court. A case in which the federal government has already brought criminal charges and the company has fired its top

---

[67] *See id.* at 1393.

[68] *See id.* at 1404-05.

[69] Baker, Perino, and Silver conducted the primary study of fee awards in securities class actions, focusing on ex ante fee agreements between lead plaintiffs and lead counsel. *See* Baker, et. al, *supra* note 66. Brian Fitzpatrick also conducted an influential study of fee awards in class actions generally. He found that "judges appear more or less to pluck percentages out of thin air or to replicate the percentages plucked out of thin air in previous awards." Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2046 (2010).

[70] *See supra* note 62 and accompanying text.

[71] *See, e.g.*, Lead Counsel's Motion for Award of Attorneys' Fees and Reimbursement of Litigation Expenses, Gupta v. Power Solutions Int'l, Inc., No. 1:16-cv-08253 (N.D. Ill. Apr. 8, 2019) (citing cases, including cases that were not securities class actions, to support the proposition that courts routinely award fees of 30-40 percent of the settlement fund); Brief in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses, In re Wilmington Trust Secs. Litig., Case No. 10-cv-00990 (D. Del. Sept. 17, 2018), at 13-14 (citing cases in which courts awarded fees of 28-30 percent of the settlement fund in cases that settled for more than $200 million, a much higher percentage than the average). As detailed below, there are a few empirical studies that provide data on fee awards, but these studies are rarely discussed in fee motions, even if they are attached as an exhibit in a voluminous affidavit. *See infra* n. 206.

[72] *See infra* Figure 12.

[73] *See* Cornerstone Research, SECURITIES CLASS ACTIONS—2021 YEAR IN REVIEW, at 17 (finding that 48 percent of core securities class actions filed between 2011 and 2020 were dismissed).

officers, for example, is a far safer bet than a case based on an earnings projection that fell short.[74] Some law firms specialize in safer bets, while other firms bring riskier cases.[75] As a result, firms face very different risks of non-recovery. In making fee awards, judges generally discuss the risks of a particular case in a superficial way, if at all.

Additionally, the risk of non-recovery generally declines during the course of the litigation. Securities class actions almost never go to trial,[76] so there are only two likely outcomes: dismissal or settlement.[77] The risk of non-recovery is essentially the risk that the case will be dismissed. At the start of the case, the risk of non-recovery is at its highest because the plaintiff has not survived any dispositive motions. Once the plaintiff has gotten past a motion to dismiss, however, the risk that the case will end without recovery falls dramatically, and this risk continues to fall after class certification and summary judgment. As a result, an hour spent drafting a complaint in a case is far riskier than an hour invested once the class has been certified and the plaintiff has survived a summary judgment motion. Put another way, because the risk of non-recovery declines as a case progresses, litigation hours invested face a declining risk as well. Yet there is no data available to judges on how litigation risk changes as the case progresses.

These data gaps are not insurmountable. Lead plaintiffs could play a more active role by requiring law firms to include at least some of this information in their RFPs. Judges could similarly require more information in motions to serve as lead counsel or motions for attorneys' fees. Yet lead plaintiffs and judges may not know what information to request, especially if they do not regularly participate in and oversee securities class actions. Judges with busy dockets may be reluctant to invest time in understanding this market. And, even if law firms did provide data on their own performance, they still may not have the market-wide data that lead plaintiffs and judges need to provide a baseline for assessing individual firms. If judges and lead plaintiffs are going to be tasked with overseeing lawyers in securities class actions, they must have this market-wide data to make an intelligent review. They also

---

[74] Stephen Choi, Jessica Erickson, & A.C. Pritchard, *Working Hard or Making Work? Plaintiffs' Attorneys Fees in Securities Class Actions*, 17 J. EMPIRICAL LEG. STUDS. 438 (2020) ("Although there typically is strong evidence of corporate wrongdoing in cases leading to the mega-settlements, this evidence often comes to light prior to the involvement of plaintiffs' attorneys through restatements, SEC and other government investigations, and/or the termination of top officers.").

[75] *See infra* Part III(B)(1)(a)(2).

[76] *See* Cornerstone Research, SECURITIES CLASS ACTIONS—2021 YEAR IN REVIEW, at 18 (finding that only 19 core securities class actions went to trial between 1997 and 2021).

[77] *See id.*

14

need guidance in formulating the right questions to ask when requesting firm-specific and case-specific data.

II.   STUDY METHODOLOGY

To understand the business of securities class action lawyering, we collected data on every federal class action involving a securities disclosure claim against a public company from 2005 to 2018—a total of 2492 class actions.[78] From the dockets available on Bloomberg Law, we hand-collected more than 200 variables for each case. We first collected data on the process of appointing lead plaintiff and lead counsel, coding the names of the proposed lead plaintiff(s) for each initial lead plaintiff motion, whether the plaintiffs were institutional investors, their claimed losses, and the law firm(s) filing the motion. From the court's lead plaintiff ruling, we collected the lead plaintiff(s) appointed as well as the name of the law firm(s) selected to represent the class. We then reviewed and coded the allegations from the final complaint,[79] as well as the specific claims.[80] We also coded all law firms listed as representing the lead plaintiff in this complaint.[81] To capture the potential stakes in the litigation, we collected from CRSP the market capitalization of the corporate defendant on the last day of the class period.

---

[78] We initially identified the class actions in our dataset using data generously provided to us by Professor Michael Klausner at Stanford Law School and from Cornerstone Research. We started our study with cases filed 2005 because the PLRSA was passed in 1995, so by 2005, law firms had had a decade to adjust to the changes promoted by this legislation. We ended the study with cases filed in 2018 to allow enough time for nearly all cases in the study to be resolved. Many of these cases continued to be litigated for several years, so this study captures modern practices in securities class actions. The coverage on Bloomberg Law is comprehensive, but not universal, particularly for cases earlier in our sample period, so there is some variation on the number of observations for our variables.

[79] The coded allegations included whether the target corporation was alleged to have fired a top officer, which was defined to include Chief Executive Officer (CEO), Chief Operating Officer (COO), Chief Financial Officer (CFO), Treasurer, Chief Technology Officer (CTO), Chief Information Officer (CIO), Chief Compliance Officer (CCO), President, or General Counsel. We also coded whether the plaintiff alleged that the target corporation restated its financial results or engaged in other accounting violations and whether the case involved an objection to a merger.

[80] This coding included section 10 claims under the Securities Exchange Act of 1934, as well as section 11 and 12 claims under the Securities Act of 1933. Starting with cases filed in 2017, we also coded section 14(a) claims under the Securities Exchange Act of 1934 as plaintiffs' firms started to rely on this subsection to file merger objection cases in federal court around this time.

[81] In determining which law firms worked on a particular case, we coded the names of the firms appointed as lead or liaison counsel, as well as the firms listed in or after the signature block of the last-filed complaint and the firms identified as working on the case in the fee affidavits if the case settled.

Again relying on Bloomberg Law, we coded information related to litigation activity and case outcomes. We coded potentially dispositive motions, including motions to dismiss, motions for class certification, and motions for summary judgment. We then coded the outcome of each case. Overall, 39.3 percent of the cases in our dataset settled, 34.4 percent were involuntarily dismissed,[82] 23.0 percent were voluntarily dismissed, and 2.9 percent are still pending. Only 0.4 percent went to trial or otherwise ended in a judgment for the plaintiff. For cases that settled, we coded the amount of the settlement, the requested and awarded fees and expenses, the claimed hours, and the lodestar. From the fee applications in those cases, we also collected the hours and lodestars of each of the plaintiffs' firms that worked on the case when available.[83]

A total of 755 plaintiffs' law firms participated in at least one securities class action in our dataset. The majority participated in only one action. Our goal in this paper is to better understand the business model of the law firms that are regular players in securities class actions. Accordingly, we limit most of our empirical analysis to plaintiffs' law firms that participated in at least 10 securities class actions in our study. This screen reduces our focus in these sections to a total of 91 firms. We specify below when our tests and analyses are limited to these 91 most active law firms.

In presenting our empirical results below, we carefully considered whether to identify specific law firms by name. Although we have detailed data on specific firms' filing practices and revenue, we cannot present all of our data in this Article, and we do not want to present data about individual firms without the necessary context. Accordingly, we chose to identify firms by name only when we were able to provide broader context about the firm's business or we were making a specific point about the firm. Part III, for example, provides an overview of the business models of the plaintiffs' firms that file securities class actions, and as part of this discussion, we highlight a small number of law firms that reflect each business model.[84] This section includes additional context about the firms' businesses, and therefore we identified the firms by name. Part IV, however, includes specific empirical observations about the ways in which judges and lead plaintiffs select and compensate law firms, and while we use firm-specific data to support these observations, we do not go into detail about

---

[82] Nearly all of the involuntary dismissals were at the Rule 12(b)(6) stage or similarly early in the litigation. Summary judgment only accounted for 0.5 percent of the outcomes.

[83] One limitation of our data collection efforts is that information on attorney hours is only available for the law firms representing the shareholder class, not for the law firms representing the defendants.

[84] We shared the relevant excerpts of this paper with these firms to give them an opportunity to note any errors or omissions.

the firms' broader businesses. Therefore, in Part IV, we generally do not identify specific firms by name.

III.   INSIDE THE BUSINESS MODELS OF LAW FIRMS

As discussed in Part I, conventional wisdom holds that plaintiffs' law firms treat their cases as a portfolio, considering their entire caseload when making decisions in individual lawsuits.[85] As a result, understanding these firms' overall business models is essential to examining potential agency costs in these cases. The scholarly literature theorizes that plaintiffs' law firms fall into two main categories—those on the "megatrack" that regularly achieve extremely large settlements and those that do not. This Part tests this theory by examining data on the 91 most active law firms. These firms received more than 96 percent of all revenue from the cases in our study, so focusing on these law firms allows an examination of the business models of the major players in these cases.

These data reveal far more diversity in business models than the scholarly literature recognizes. We identify six discrete business models, four of which include firms that primarily serve as lead counsel and two of which include firms that primarily serve in non-lead supporting roles as liaison counsel or additional counsel.[86] This Part first explores these different business models, analyzing law firm roles and revenue patterns of the lead counsel firms and then the supporting law firms. It ends by examining the challenges for law firms in creating litigation portfolios to smooth out their earnings over time.

A. *Law Firm Roles and Revenue*

1. Lead Counsel Firms

This section analyzes the business model of law firms that primarily serve in the role of lead or co-lead counsel. This is a more rarified group than one might think. Of the 91 most active law firms in our study, there was not a single top firm that served exclusively in the lead or co-lead role. Our analysis in this section focuses on the law firms that served as lead or co-lead more than they served in other roles, a total of 49 firms, which we call lead

---

[85] *See supra* notes 35-36 and accompanying text.
[86] We did not find that plaintiffs' lawyers regularly serve in any other roles in securities class actions, nor did we find evidence of the complex leadership structures (i.e., steering committees, executive committees, discovery committees, etc.) seen in MDL litigation. *See supra* note 37.

counsel firms.[87] These firms have four different business models, each analyzed separately below.

Table 1: Lead Counsel Business Models

Business Model	Description	# of Law Firms
Top-Tier	Lead counsel firms with average settlements exceeding $30 million	15
Mid-Tier	Lead counsel firms with average settlements between $9 and $30 million	16
Bottom-Tier	Lead counsel firms with average settlements less than $9 million, excluding merger objection firms	11
Merger Objection	Lead counsel firms that primarily file securities class actions challenging disclosures made in connection with mergers and acquisitions	7

The settlement bands for the Top/Mid/Bottom-tier firms reflect the 50th (approximately $9 million) and 75th percentiles (approximately $30 million) for the settlements in our study.[88] As we shall see, these bands have different clientele, filing patterns, and revenue models.

a) Top-Tier Firms

This category includes the fifteen law firms that achieve settlements averaging at least $30 million. These firms include the most well-known plaintiffs' law firms in securities class actions. Unsurprisingly, these firms also have the highest total revenue. Firms do not disclose their annual revenue, but we estimate these figures using information in fee

---

[87] As discussed in greater detail below, plaintiffs' law firms often hold different roles in different cases, so a firm that is lead counsel in one case may serve as additional counsel or liaison counsel in another. In categorizing firms for this section, we used the role that the firm held in at least a plurality of its cases. For example, a law firm that served as lead counsel in 10 cases, liaison counsel in 5 cases and additional counsel in 6 cases would be classified as a lead counsel firm. To calculate a firm's average settlement, we used the cases in which the law firm served as lead or co-lead counsel.

[88] The 50th percentile of settlements in our study is $9.24 million, and the 75th percentile is $26.6 million. There were no law firms with average settlements between $26 million and $35 million, so we drew the line between top and mid-tier firms at $30 million for ease of reference. There were also no firms with average settlements between $8 million and $9 million, so we drew the line between mid-tier and bottom-tier firms at $9 million, again for ease of reference. These settlement figures also include the rare judgments issued against defendants. Because our focus in this paper is on the law firms, rather than individual cases, the 50th and 75th percentiles are calculated based on firm-level data, so the same settlement amount could be repeated in the calculation if there was more than one lead counsel firm in the case.

applications and awards. Plaintiffs' law firms work on a contingency fee basis in securities class actions, only receiving a fee if the case settles. A law firm's revenue therefore equals its share of the fees awarded in the cases in which the firm participated.[89] These fees are awarded by the court, and the amount is included in the case record.

Calculating a firm's share of these fees can be challenging. If only one plaintiffs' law firm worked on the case, we credited this law firm with the entire fee award. If multiple law firms worked on the case, the allocation of fees was more difficult because firms typically do not disclose to the court how they divided the fee award. As a result, we do not know the percentage of the total fee award that each firm received. We instead estimated this allocation, with the estimation method depending on whether the plaintiffs' law firms in the case filed fee affidavits detailing the hours that each firm worked and their lodestars. If they filed such affidavits, we based the fee allocation on the relative lodestars. For example, if a law firm had 60 percent of the total lodestar, we allocated 60 percent of the fee to that firm. If the law firms did not file fee affidavits with their respective hours and lodestars, we evenly divided the fees among the firms that served as lead counsel. Although this estimation method may not exactly track how the firms themselves divided the fees,[90] it should provide a useful benchmark.

Using this approach to estimate firm revenue, two top-tier lead counsel firms stand out as top earners—Robbins Geller Rudman & Dowd LLP ("Robbins Geller") and Bernstein Litowitz Berger & Grossmann LLP ("Bernstein Litowitz"). We estimate that both firms earned over $1 billion in fees from securities class actions between 2005 and 2018. Robbin Geller's estimated revenue from securities class actions filed during this time period was $1.64 billion, while Bernstein Litowitz's was $1.30 billion. Calculated on an annual basis between 2010 and 2018,[91] we estimate Robbins Geller made $90.7 million per year from securities

---

[89] Many of the law firms in this study also file other types of lawsuits. The revenue estimates presented here are only from securities class actions.

[90] As discussed below, this allocation method underestimates the fees paid to firms that serve as additional counsel because these firms often do not file a fee affidavit. Firms may also agree ex ante on how they will divide fees, rather than basing their fee allocation on their respective lodestars. For these reasons, the revenue estimated presented here are necessarily imprecise.

[91] Calculating the average annual revenue is complicated, as we could not simply divide the total revenue over these years by 14 (the number of years in our study). In the early years of our study, the law firms received fees from cases filed and settled in those years, but they also received fees from cases filed before the start of our study, as securities class actions often take several years to resolve. In addition, although we collected data on cases filed through 2018, these cases sometimes did not end until 2021 or later. In these later years, the law firms also received fees from cases filed after 2018. To calculate average annual revenue more accurately, we focused on revenue received by firms in 2010-2018, as our study should capture most of the

class actions, while Bernstein Litowitz made $101.0 million per year. Together, these two firms earned an estimated 43.5 percent of the total attorneys' fees in the securities class actions in our study, reflecting the market concentration in this area of law.[92]

What does it take to make over $1 billion in attorneys' fees? First, a firm has to participate in a significant number of cases, primarily serving as lead or co-lead counsel in these cases. Robbins Geller participated in a total of 582 cases, serving as lead or co-lead counsel in 90.0 percent. Bernstein Litowitz participated in a total of 154 cases, serving as lead or co-lead counsel in 88.3 percent. Law firms need many lawyers and support personnel to participate at this volume, so these two firms are also much bigger than the typical plaintiffs' firms.[93] Indeed, when scholars note that "larger firms have in fact come to dominate the plaintiffs' class action bar,"[94] they likely have firms like Robbins Geller and Bernstein Litowitz in mind.

Second, a firm must represent primarily institutional lead plaintiffs, which typically are the lead plaintiffs in cases with the largest potential recovery for the class and thus greatest potential fees. Among all of Robbins Geller's cases in our sample, 78.8 percent included at least one institutional lead plaintiff. For Bernstein Litowitz, the number was 98.5 percent. These firms use portfolio monitoring services as one means to develop relationships with institutional clients. In its promotional literature, Bernstein Litowitz says it provides portfolio monitoring services to over "250 institutional investors, including approximately 200 public pension funds."[95] The PSLRA has made relationships with union

---

revenue from securities class actions in these years. We omitted individual years at the start of the study period if the law firm had not yet started filing securities class actions, as well as individual years at the end of the study period if the law firm had stopped filing securities class actions.

[92] The 5-firm concentration ratio for the top five law firms in terms of overall revenue is 64.3 percent. These numbers underscore the relatively high level of market concentration in this area. Outside of the top 5 firms, there are several other law firms that earn a much smaller percentage of fees. We computed the Herfindahl-Hirschman Index (HHI) using the percentage of total attorney fee revenues for each law firm that received fees in our sample. The resulting HHI score for all law firms earning fees of 1,156 is below the 1,500 to 2,500 range that the Department of Justice considers as "moderately concentrated". *See* https://www.justice.gov/atr/herfindahl-hirschman-index.

[93] In June 2022, Robbins Geller listed 192 attorneys on its firm website, while Bernstein Litowitz listed 73 attorneys. *See* Robbins Geller Rudman & Dowd LLP, Attorney Search, at https://www.rgrdlaw.com/attorneys.html?view_all=1; Attorneys & Professionals, Bernstein Litowitz Berger & Grossmann LLP, at https://www.blbglaw.com/people.

[94] *See* Morris Ratner, *A New Model of Plaintiffs' Class Action Attorneys*, 31 REV. LITIG. 757, 774 (2012).

[95] Bernstein Litowitz Berger & Grossmann LLP, Proposal to Provide Legal Services Submitted to the Arkansas Teacher Retirement System (Sept. 19, 2019).

and public pension funds a de facto requirement for law firms seeking to make it to the top echelon of law firms in this area.

The two firms differ in one important way. Although both firms regularly obtain significant settlements, Bernstein Litowitz's average settlement in the cases in which it is lead or co-lead counsel ($120.3 million) is more than double Robbins Geller's average settlement ($47.5 million). This difference explains why the total revenue of the two firms is similar even though Robbins Geller files many more cases. What explains Bernstein Litowitz's larger settlement average? The firm appears to file complaints with stronger objective indicia of wrongdoing. Their cases, for example, have higher rates of parallel SEC investigations,[96] officer terminations,[97] and restatements[98] than Robbins Geller's cases. Bernstein Litowitz's cases also attract more lead plaintiff motions—4.47 to 2.56—than Robbins Geller's cases. That level of competition suggests that Bernstein's stable of institutional clients allows it to win hotly contested lead plaintiff contests in the most promising cases.

The other top-tier firms have similar business models, although they participate in fewer cases. These firms have average settlements in the cases that they control ranging between $159.5 million and $35.8 million, and they have an average annual estimated revenue of $25.1 million from securities class actions. They primarily represent institutional clients.[99] They participated in an average of 7-8 cases per year, although this number varies significantly by firm, and they served as lead or co-lead counsel cases in approximately 75.1

---

[96] 36.8 percent of Bernstein Litowitz's cases involved a parallel SEC investigation compared to 17.4 percent of Robbins Geller's cases.

[97] 62.5 percent of Bernstein Litowitz's cases involved termination of at least one top officer at the target company compared to 43.1 percent of Robbins Geller's cases.

[98] 22.1 percent of Bernstein Litowitz's cases involved restatements by the target company compared to 18.1 percent of Robbins Geller's cases.

[99] *See infra* Part III(A)(1)(e)(1).

percent of their cases.[100] They also faced (and beat) more competition in lead plaintiff contests than law firms in the lower tiers.[101]

This business model brings in a lot of revenue, but it requires substantial connections. The law firms in this category have managed to develop relationships with large institutional clients, which allows them to secure the lead counsel position in the most lucrative cases. Together, the firms in the top tier received an estimated 76.6 percent of the total fees awarded during this period, reflecting the market concentration created by the PSLRA's presumption favoring institutional investors.

b) Mid-Tier Lead Counsel Firms

Another sixteen law firms have average settlements between $9 and $30 million, putting them in the middle tier of lead counsel firms. These law firms serve as lead counsel in cases against companies that are considerably smaller than the top-tier firms,[102] which means that the estimated damages in these cases are typically smaller as well. Their cases also have less competition for the lead plaintiff spot, indicating that they are deemed less desirable from the outset.[103] Finally, their cases are far less likely to involve one or more institutional lead plaintiffs.[104]

Overall, these firms earned far less than the firms at the top—just 10.2 percent of the total fees in our dataset, compared to the 76.6 percent earned by the top-tier firms. This statistic alone shows the sharp drop from the top-tier to the middle-tier, as the average top-tier firms earned more than 7 times as much revenue as the average mid-tier firms over the study period. Yet the firms in these tiers still made a good amount of money, averaging an

---

[100] The figures in this paragraph, along with all other figures in this Part relating to averages in a particular tier of law firm, are calculated on a per-firm basis, which means that they are an average of the firm-specific figures for the firms in the particular tier. For example, in reporting that the top-tier firms served as lead or co-lead counsel cases in approximately 75.0 percent of their cases, we first calculated the percentage of each top-tier firm's cases in which the specific firm served as lead or co-lead counsel, and we then averaged these percentages. We chose this approach because it weights each firm in a tier equally, rather than giving more weight to the high-volume filers in a particular tier. This approach provides a more accurate reflection of the business models in each tier.

[101] The law firms in this tier faced an average of 3.91 lead plaintiff motions in their cases. For a comparison to other law firms in other business model tiers, see Figure 5 and accompanying text.

[102] *See infra* Part III(A)(1)(e)(1).

[103] *See id.*

[104] *See id.*

estimated total of $43.3 million from cases filed during the fourteen years of our study. Between 2010 and 2018, the firms had an average revenue of $2.78 million per year.[105]

The law firms earning the most money in this tier have turned the mid-tier market into a volume business. The law firm of Glancy Prongay & Murray, for example, had an average settlement of $10.7 million for the cases in which it served as lead or co-lead counsel, near the low end for the firms in this tier. But they participated in a total of 227 cases, the fourth highest in our dataset, leading to estimated total revenues of $139.3 million from securities class actions filed during our study period. The firm does not have many institutional clients, but they made up for this weakness by filing a larger number of smaller cases. The other firms with relatively high estimated earnings in this tier have a high percentage of cases with institutional lead plaintiffs.[106] This point reinforces the earlier observation that an institutional client base is essential in securing the lead counsel role in more lucrative cases.

Staying in this middle tier can be challenging. Some firms have maintained a steady practice in securities litigation during this time period, but others have seen their fortunes fall. Several of the law firms in this tier were busy during the early years covered by our study, but have filed few securities class actions in recent years. These firms have either closed or migrated to other practice areas.[107] Other firms in this tier have started to file merger objection lawsuits, a high-volume/low-return practice. These shifts may reflect the changing landscape of securities class actions. Obtaining the lead counsel spot in the most lucrative cases requires a stable of large, institutional investors willing to serve as lead plaintiffs, and these firms may not have been able to compete against the top-tier firms for these clients, forcing them to diversify their caseloads.

c) Bottom-Tier Lead Counsel Firms

Another eleven law firms have average settlements of $9 million or less and fall into the bottom tier of lead counsel firms. This does not necessarily mean that their cases lack

---

[105] *See supra* note 91 for a discussion of why we focused on these years to estimate average annual revenue.

[106] The other two firms in this tier with the highest total revenue use institutional plaintiffs in at least 60 percent of its cases.

[107] Milberg LLP, one of the firms in this tier, became embroiled in scandal when some of its partners went to jail after confessing to paying plaintiffs for serving in securities class actions. *See* Jonathan Glater, *Class-Action Lawyer Gets 30 Months in Prison*, NEW YORK TIMES (June 3, 2008). It survived this scandal, but now focuses on other types of litigation. *See* Milberg, Our Practice Areas, at https://milberg.com/practice-areas/. The other firms that have moved away from this practice area focus on other types of class actions or other practice areas altogether. *See, e.g.,* Izard Kindall & Raabe: Our Practice, at https://ikrlaw.com/our-practice/.

merit. Many bottom-tier firms serve as lead counsel in cases involving fraud that is just as egregious as the cases filed by the top-tier firms. In addition to nuisance litigation, there are other reasons why securities class actions that involve clear fraud might still settle for relatively low amounts. For example, the target corporation might be smaller, as cases against lower market capitalization companies tend to have lower estimated damages.[108] The impact of the fraud may have been less, causing a less dramatic stock price fall. Or the target company may have faced insolvency or been outside the reach of U.S. courts, leaving shallower pockets from which shareholders could recover.[109]

Yet this business model does not generate nearly as much revenue as the business model of the top-tier law firms, as the bottom tier collects only 3.9 percent of the total estimated revenue in these cases. Sheer volume of cases, however, can mitigate this difference. As discussed above, the top-tier law firms focus on larger, more lucrative cases and capture more than three-quarters of the estimated revenue in securities class actions. The law firms that focus on smaller cases can still make substantial money, but it requires heavy volume. Ranking plaintiffs' law firms by their estimated total revenue during the study period, only one of the top ten firms focuses on these smaller cases—the Rosen Law Firm with an estimated $154.5 million in total revenue.

The Rosen Law Firm achieves such high earnings by filing a lot of cases. The firm participated in 264 cases during the study period, second only to Robbins Geller, allowing the firm to generate as much revenue as some of the law firms responsible for the largest securities class action settlements in the country. Although it may be moving closer to the

---

[108] *See, e.g.*, Baker, Griffith, McShane, & Watson, *Predicting Securities Fraud Settlements and Amounts: A Hierarchical Bayesian Model of Federal Securities Class Action Lawsuits*, 9 J. EMPIRICAL LEG. STUDS. 482 (2012) (modeling damages in securities class actions and showing that market capitalization is one of the largest predictors of settlement amounts).

[109] For example, a number of securities class actions against Chinese companies that used reverse triangular mergers to be listed on U.S. stock exchanges settled for relatively low amounts, but these issuers had little money and recovering on a judgment was more challenging than the typical securities class action against a U.S.-based company. *See, e.g.*, Declaration of Laurence Rosen, McGee v. China Electric Motor, Inc., No. 11-cv-2794 (C.D. Cal Aug. 12, 2013) (justifying a settlement against China Electric Motor, Inc. because "[t]here is a risk that China Electric could become insolvent due to doubts about its ability to continue as a going concern" and "[p]laintiffs face a significant challenge in successfully collecting on a U.S. judgment in China"). Moreover, even the smaller settlements in securities class actions are still relatively large amounts. This category includes firms with average settlements under $9 million. In the broader context of securities class actions, settlements in this range are in the bottom half of all settlements in this practice area, but for a given law firm, regularly achieving seven-figure settlements can still lead to a very profitable business.

mid-tier in recent years,[110] it is a good example of a firm that makes a decent living by filing a large number of relatively low-value cases. Despite its high volume of cases, however, the Rosen Law Firm is relatively small with only 20 lawyers.[111] In contrast, Bernstein Litowitz has more than three times as many lawyers (73) even though it files approximately 40 percent fewer securities class actions.[112] These staffing figures correspond to different litigation intensities. Bernstein Litowitz needs more lawyers to handle fewer cases because its cases are bigger, more complicated, and more likely to face vigorous resistance from defense firms. The smaller cases that Rosen Law Firm and other similar firms handle are less complicated and need fewer lawyers. Nonetheless, the firm has carved out a lucrative niche filing a high volume of lower-value cases.

Most of the bottom-tier firms have far less estimated total revenue from securities class actions. Excluding the Rosen Law Firm, the firms in this tier had an average total revenue of $11.2 million from securities class actions between 2005 and 2018.[113] These sums pale in comparison to the $1.64 billion Robbins Geller earned over the same period. This stark difference can cause firms in the lower tier to be overlooked. Firms in this tier typically do not appear at the top of lists highlighting firms responsible for the largest securities class action settlements.[114] Nor are their lawyers highlighted in as many lists of top plaintiffs' attorneys.[115] Away from the spotlight, however, the law firms in this tier participated in more cases than firms in the middle tier.[116]

---

[110] The firm was one of the first to sue Chinese companies that engaged in fraud on the U.S. markets, and it obtained a $250 million settlement against the Chinese company of Alibaba Group Holding Ltd. in 2019, which increased its average settlement amount. *See* Memorandum of Law in Support of Lead Counsel's Motion for Award of Attorneys' Fees, Christine Asia Co., Ltd. V. Ma, 1:15-md-02631 (Sept. 11, 2019 S.D.N.Y.) (discussing settlement and requesting $62.5 million in fees).

[111] Attorneys, The Rosen Law Firm, at https://rosenlegal.com/attorneys/.

[112] *See supra* note 93 and accompanying text.

[113] We estimate that these firms made an average of $1.1 million per year from securities class actions between 2010 through 2018, or approximately $650,000 excluding the Rosen Law Firm.

[114] *See, e.g.*, Institutional Shareholder Services, The Top 50 of 2021 (Mar. 4, 2022), at https://www.issgovernance.com/library/the-top-50-of-2021 (listing the top 50 plaintiff law firms ranked by securities class action settlements in 2021)

[115] *See, e.g.*, *500 Leading Plaintiffs Financial Lawyers*, LawDragon (Aug. 18, 2021), at https://www.lawdragon.com/guides/ 2021-08-18-the-2021-lawdragon-500-leading-plaintiff-financial-lawyers; *Trailblazers: Plaintiffs' Lawyers*, Nat'l L.J. (2022), at https://images.law.com/media/nationallawjournal/supplements/NLJTB_Plaintiffs_2022/index.html#p=1.

[116] The top tier of lead counsel firms each participated in an average of 91.7 cases as lead or co-lead counsel (or 60.9 cases, not counting the firm of Robbins Geller, which led significantly more cases than any other firms in the dataset). The firms in the middle tier served as lead or

Electronic copy available at: https://ssrn.com/abstract=4350971

Despite generating less revenue from securities class actions, these law firms survive by filing a variety of other types of claims as well. Many of these firms also file shareholder derivative suits, wage and hour lawsuits, consumer protection suits, or personal injury claims.[117] These suits typically involve smaller attorneys' fees, but they do not have the barriers to entry created by the PSLRA's lead plaintiff provisions. Many of these firms simply dabble in securities class actions, putting the majority of their efforts into other types of claims not subject to the PSLRA's procedural hurdles.

d) Merger Objection Law Firms

We treat as a distinct category those lead counsel law firms that primarily file merger objection suits. Approximately 19 percent of the cases in our study were merger objection suits, and nearly all of them were filed by the same seven firms.[118] The plaintiffs in these cases typically alleged that the defendant corporation failed to disclose certain material information about a proposed merger or acquisition.[119] These cases almost always ended with a voluntary dismissal, presumably because the corporation agreed to make additional disclosures and then paid an undisclosed mootness fee to the plaintiffs' attorneys.[120]

These lawsuits have been widely criticized. In theory, additional disclosures could benefit shareholders, but studies have found no evidence that they do.[121] Nonetheless, these merger objection suits are ubiquitous, with the same handful of law firms filing lawsuits

---

co-lead counsel in an average of 35.6 cases, and the firms in the bottom tier filed an average of 46.4 cases.

[117] *See, e.g.*, The Firm, Gardy & Notis, at https://www.gardylaw.com/the-firm/ (stating that, in addition to securities class actions, the firm specializes in litigation related to mergers and acquisitions, corporate governance, consumer protection, and employment litigation); Practice Areas, Wolf Haldenstein Adler Freeman & Herz, at https://www.whafh.com/practice-areas (stating that the firm specializes in cases involving investor protection, business practice, labor, consumer protection, and social justice issues).

[118] These merger objection suits were filed primarily in 2017 and 2018, the last two years in our study.

[119] *See* Sean J. Griffith, *Frequent Filer Shareholder Suits in the Wake of Trulia: An Empirical Study*, 2020 WIS. L. REV. 443 (2020) ("The pattern of these lawsuits is well documented: filings seek injunctive relief and settle (or, more recently, are mooted) by the defendants' release of supplemental disclosures in the merger proxy, on account of which the plaintiffs' lawyers are entitled to a fee based upon the corporate benefit doctrine.")

[120] *See id.* at 445. Of the merger objection suits in our study that were resolved, 88.5 percent were dismissed.

[121] *See* Jill Fisch, et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 561 (2015) (finding that "disclosure-only settlements do not appear to affect shareholder voting in any way"). A recent spate of suits targeting SPAC mergers seems no more promising. *See* Emily Strauss, *Suing SPACS*, 96 SO. CAL. L. REV. (forthcoming).

that challenge nearly all large mergers and acquisitions.[122] These suits were filed in state court under state fiduciary duty law until the Delaware Court of Chancery cracked down on them, stating that "far too often such litigation serves no useful purpose for stockholders."[123] According to the court, the primary purpose of these suits is "to generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints."[124] To avoid Delaware's scrutiny, lawyers started to file these cases in federal court instead, repackaging the claims under the federal securities laws.[125]

This strategy has proven very successful, as these firms have been able to maneuver around the PSLRA. Their business model of getting the defendant to pay a small mootness fee soon after filing means that they avoid the PSLRA's lead plaintiff process and heightened pleading standards. Moreover, structuring the payments as a mootness fee rather than a settlement payment means they do not need court approval.[126] As a result, these cases function almost entirely outside of judicial scrutiny.

Several of the firms in our study that specialize in these cases have only a few attorneys,[127] yet they still manage to file dozens of merger objection cases per year. These cases are typically dismissed within weeks of being filed, almost always before the court appoints a lead plaintiff or any other briefing has occurred. The court rarely asks any questions about the terms of the dismissal. Although we cannot estimate how much money law firms make from these cases, they appear to be relying on a high-volume/low-revenue business model. In recent years, these law firms have started to file merger objection suits as individual actions, rather than class actions, perhaps to avoid even the possibility of judicial review.[128]

---

[122] More than 80 percent of public company deals valued at over $100 million were challenged in court in 2017 and 2018. *See* Cornerstone Research, Shareholder Litigation Involving Acquisition of Public Companies: Review of 2018 M&A Litigation, at 2.

[123] In re Trulia, Inc. S'holder Litig., 129 A.3d 884, 891 (Del. Ch. 2016).

[124] *Id.* at 891-92.

[125] Cain et. al., *supra* note 14, at 631-32.

[126] Rule 23 of the Federal Rules of Civil Procedure only requires court approval of voluntary dismissals or settlements if the class has been certified or proposed to be certified for purposes of settlement. *See* F.R.C.P. 23(e).

[127] For example, the law firm of RM Law participated in a total of 73 cases in our study, all in 2017 and 2018. Yet the firm's website only lists a single lawyer. *See* About RM Law, at https://rmclasslaw.com/about. Rowley Law, which filed more than a dozen merger objection suits in our study, appears to have two lawyers. *See* About Rowley Law PLLC, at https://rowleylawpllc.com/about/.

[128] *See* Choi, et al., *Frequent Filers Revisited: Professional Plaintiffs in Securities Class Actions,* Institute for Legal Reform (Apr. 21, 2022), at 25-26 (discussing individual merger objection lawsuits).

These firms highlight the range of law firm business models that fall under the umbrella of securities litigation. Like other lead counsel firms, these firms file cases under the federal securities laws, but their business model could not be more different. Indeed, the merger objection firms pursue a business model quite distinct from the model of the bottom-tier lead counsel firms described above. As this analysis suggests, it is misleading to lump plaintiffs' law firms that file securities class actions into a single category or even into the high-stakes/low-stakes categories seen in the literature.

e) Comparing the Tiers

The prior discussion discussed the four types of lead counsel firms, exploring their business models. In this section, we compare the law firms in each tier, analyzing the types of cases that the firms file, how they litigate these cases, and the outcomes of their cases.

1. Case Characteristics

How do the litigation portfolios of these four tiers compare on the merits? To gain insight on this question, we identify several case characteristics known at the filing of suit that likely correspond to the likelihood of fraud in the action (termed the "objective indicia of fraud"). These include cases that involve a parallel SEC investigation, a parallel other government investigation (such as a DOJ investigation), a termination of a top officer,[129] and a restatement. We also look at whether the case involves an institutional lead plaintiff. We compare these characteristics for cases that settle in our dataset with those that are dismissed. The chart below compares the fraction of the cases in the settled and dismissed categories having these characteristics. In the last column, we present p-values from a chi-squared test of the difference between the two categories.

---

[129] For top officers, we include the chief executive officer, chief operating officer, chief financial officer, treasurer, chief technology officer, chief information officer, chief Compliance officer, president, general counsel, executive chairman, and chief accounting officer.

Table 2: Differences in Case Characteristics

Case Characteristic	Fraction of Settled Cases with the Case Characteristic	Fraction of Dismissed Cases with the Case Characteristic	p-value
SEC Investigation	.300	.091	0.000
Other Govt. Investigation	.294	.139	0.000
Officer Termination	.533	.259	0.000
Restatement	.284	.096	0.000
Institutional Lead Plaintiff	.578	.327	0.000

From this chart, we see that there are significant differences between settled and dismissed cases. For example, 30 percent of the settled cases included a parallel SEC investigation, while only 9 percent of the dismissed cases did. Similarly, 53 percent of the settled cases included allegations that a top officer was terminated, compared with only 26 percent of the dismissed cases. Firms that succeed in securing the lead counsel role in cases with these characteristics are more likely to win a fee for their efforts.

We can then use this data to compare the types of cases filed by the firms in each tier. For each law firm we compute the fraction of cases with a particular characteristic. We then compute the mean value for all law firms in each tier. Using this method, we find that the cases filed by the top-tier firms do involve greater objective indicia of fraud. Compared to those filed by bottom and mid-tier firms, the cases filed by the top-tier firms are more likely to involve a parallel SEC or government investigation, officer termination, or restatement. In contrast, suits filed by merger objection firms overwhelmingly lack these indicia, reflecting that merger objection suits are different in kind than more traditional securities class actions. Figure 1 shows the mean fraction of cases for lead counsel firms in the different tiers that had a parallel SEC or other government investigation.[130]

---

[130] The differences in the mean fraction of cases with a SEC Investigation between (a) the Top-Tier Firms and (b) the Mid-Tier, Bottom-Tier, and Merger Objection Firms is significant at the 5%, 5%, and 1% levels respectively. The differences in the mean fraction of cases with an Other Government Investigation between (a) the Top-Tier Firms and (b) the Mid-Tier, Bottom-Tier, and Merger Objection Firms are all significant at the 1% level.
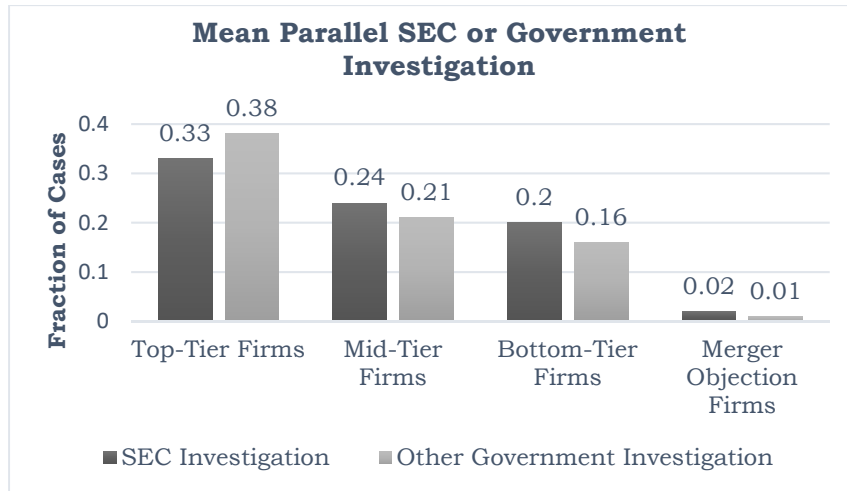
Figure 1

Figure 2 shows the mean fraction of cases for lead counsel firms in the different tiers with allegations of a top officer termination or a restatement.[131]
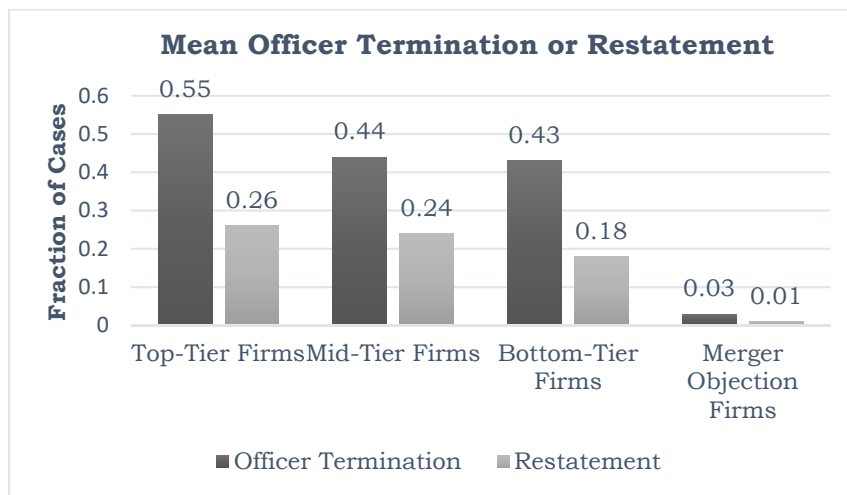

Figure 2

That said, as these figures demonstrate, the top tier firms also file plenty of cases lacking objective indicia of fraud. Even among the top-tier firms, for example, many cases do not involve a restatement or a parallel SEC or government investigation. For the top-tier firms,

---

[131] The differences in the mean fraction of cases with Officer Termination between (a) the Top-Tier Firms and (b) the Mid-Tier, Bottom-Tier, and Merger-Objection Firms are significant at the 5%, 5%, and 1% levels respectively. The difference in the mean fraction of cases with a Restatement between (a) the Top-Tier Firms and (b) the Mid-Tier Firms for Restatement is not significant; the differences in the mean fraction of cases with a Restatement between (a) the Top-Tier Firms and (b) the Bottom-Tier and Merger-Objection Firms for Restatement are significant at the 10% and 1% levels respectively.

Electronic copy available at: https://ssrn.com/abstract=4350971

the only case characteristic present in a majority of cases is officer terminations, and even here it is only a slight majority.

To get an overall sense of the prevalence of indicia of wrongdoing at the time of the complaint filing, we tabulated for each law firm the fraction of cases with no objective indicia of wrongdoing, defined as a case without an SEC investigation, other government investigation, restatement, or officer termination mentioned in the last-filed complaint. We report the mean fraction for lead counsel firms in the different tiers in Figure 3 below. Note that 28 percent of the cases for the top-tier firms had no objective indicia of wrongdoing compared with 38 and 42 percent of the cases for the middle and bottom tiers. The suits filed by merger objection firms overwhelmingly lacked the same objective indicia of wrongdoing found in more traditional securities class actions.[132]

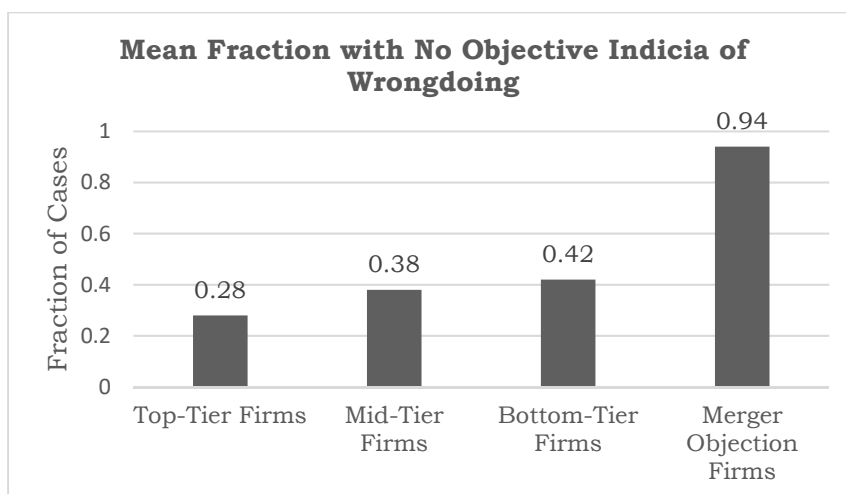**Mean Fraction with No Objective Indicia of Wrongdoing**

Figure 3

Of course, the allegations in the complaint are only one marker of a case's likelihood of recovery. Elements of the cause of action like scienter and loss causation are also important to probability of recovery, but less amenable to reliable coding for statistical purposes. Given the difficulty of coding these elements directly, we instead rely on two proxies for the likelihood of recovery—the presence of institutional investors as lead plaintiffs and the number of initial lead plaintiff motions. Institutional investors are likely to have a more nuanced perspective on the likelihood of recovery when they choose which cases to participate in, as reflected by the sharply higher percentage of institutional investors in settled cases shown in Table 2 above. Comparing our top three tiers, we find a much starker

---

[132] The differences the mean fraction of cases with No Objective Indicia of Wrongdoing between (a) the Top-Tier Firms and (b) the Mid-Tier, Bottom-Tier, and Merger-Objection Firms are significant at the 5%, 5%, and 1% levels respectively.

difference in the mean fraction of cases with at least one institutional plaintiff as depicted in Figure 4. The cases filed by bottom-tier firms are much less likely to have at least one institutional investor serving as lead plaintiff.[133]

Mean Fraction of Cases with Institutional Lead Plaintiff
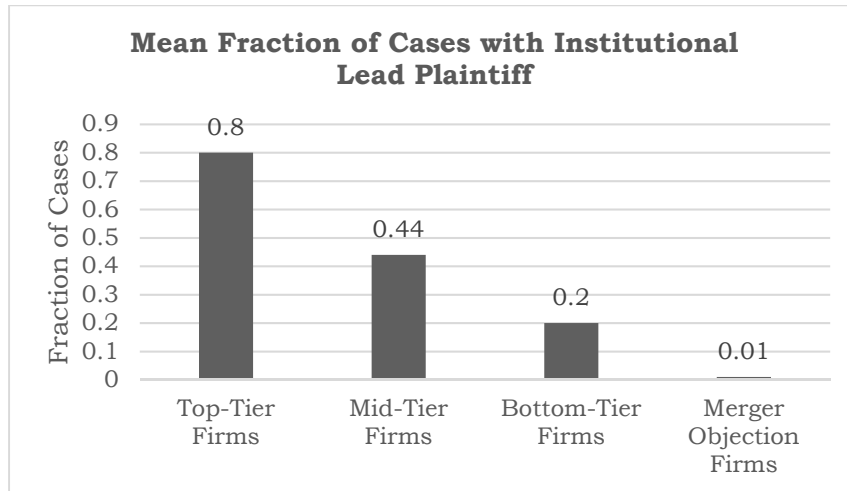
Figure 4

Similarly, the top-tier firms face more competition at the lead plaintiff stage, reflecting that the cases are viewed as better bets by competing law firms. Figure 5 supports this hypothesis by reporting the mean number of initial lead plaintiff motions for lead counsel firms in each tier.[134]

Mean Number of Initial Lead Plaintiff Motions
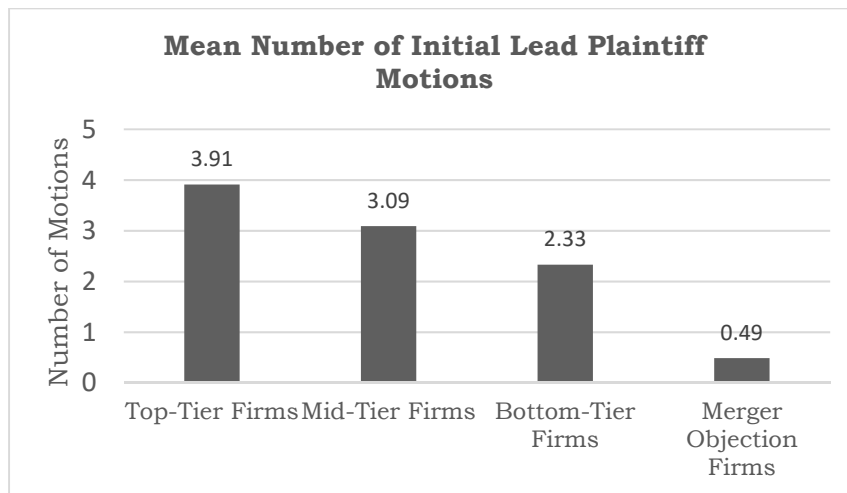
Figure 5

---

[133] The differences in mean fraction of cases with at least one institutional lead plaintiff between (a) the Top-Tier Firms and (b) the Mid-Tier, Bottom-Tier, and Merger-Objection Firms are all significant at the 1% level.

[134] The differences in the mean number of initial lead plaintiff motions between (a) the Top-Tier Firms and (b) the Mid-Tier, Bottom-Tier, and Merger-Objection Firms are significant at the 5%, 1%, and 1% levels respectively.

Finally, the mean market capitalization of corporations targeted by top-tier firms is also much greater than that of corporations targeted by bottom-tier and mid-tier firms as depicted in Figure 6.[135]
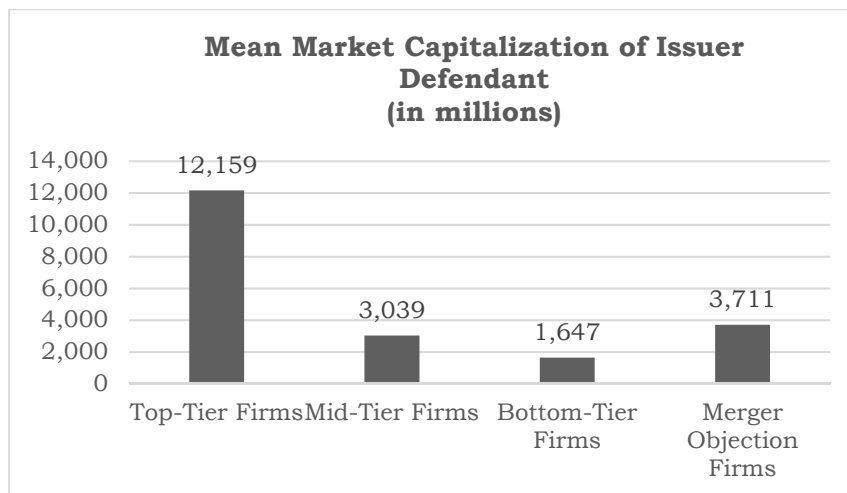

Figure 6

On the whole, therefore, the top-tier firms serve as lead counsel in cases that look better from the start. These cases target larger companies, and they have greater objective indicia of fraud. Although nearly all firms in this practice area would likely want to control these cases, the top-tier firms use their client base of institutional investors to win the lead plaintiff contest in these cases.

2. Case Length

We see from the prior section that the top-tier firms target larger companies with allegations that reflect greater objective indicia of fraud. Once the cases are filed, however, how are they litigated? As Figure 7 below shows, the cases filed by merger objection firms end far more quickly on average than cases filed by other firms, again highlighting these firms' different approaches to their cases.[136]

---

[135] We compute the average market capitalization of corporate defendants targeted by each law firm. We then compute the mean of this average for law firms in each tier (termed the "mean market capitalization"). The differences in the mean market capitalization of the issuer defendant between (a) the Top-Tier Firms and (b) the Mid-Tier, Bottom-Tier, and Merger-Objection Firms are significant at the 1%, 1%, and 5% levels respectively.

[136] The differences in the mean case length in days between (a) the Top-Tier Firms and (b) the Mid-Tier, Bottom-Tier, and Merger-Objection Firms are all significant at the 1% level respectively.
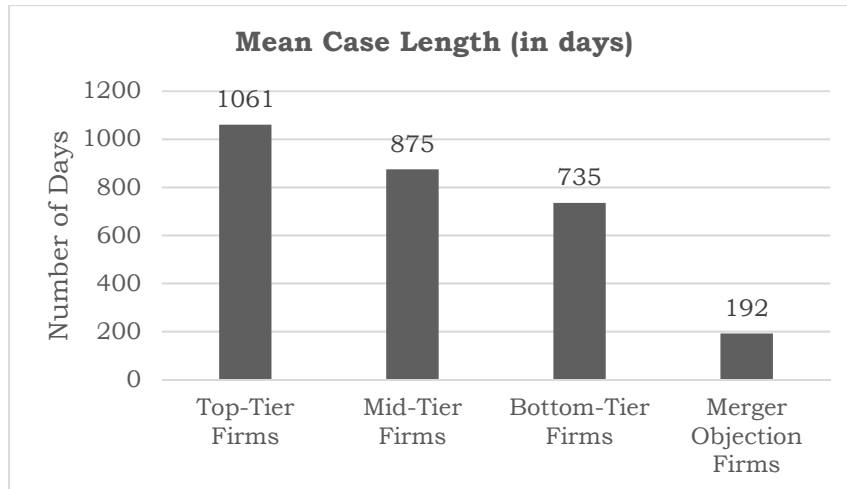
Figure 7

Figure 7 also demonstrates that bottom-tier firms reach a resolution more quickly than top or mid-tier firms, although the difference is not as stark. These differences suggest that bottom-tier firms typically litigate their cases less intensively.

3. Case Outcomes

In comparing lead counsel firms, the final—and perhaps most important— question is how the cases end. Do top-tier firms get better results than the firms in other tiers? We find that that they do. Figure 8 compares the mean settlement rates for law firms in the four tiers of firms in the case in which they served as lead or co-lead counsel.[137]

---

[137] The differences in the mean settlement rate for law firms between (a) the Top-Tier Firms and (b) the Mid-Tier, Bottom-Tier, and Merger-Objection Firms are significant at the 1%, 5%, and 1% levels respectively.
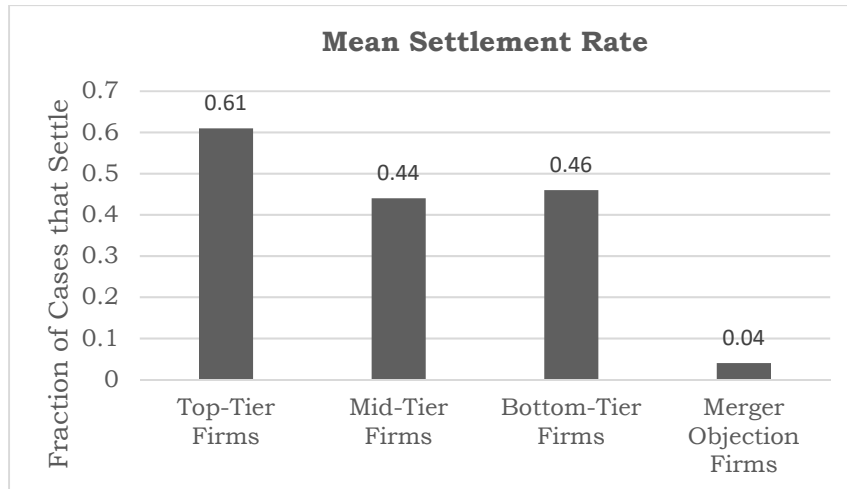
Mean Settlement Rate

Figure 8

This outcome is not surprising. The top-tier firms win the lead counsel spot in cases that look more promising from the outset, so they should get better outcomes. Yet this comparison does raise an issue to which we will return in Part IV. These objective criteria of fraud are typically present (and publicly available) when the complaint is filed; these allegations are not uncovered by the law firms' efforts. A law firm, for example, does not cause the corporation to fire its CEO or restate its earnings. Nor does the law firm influence the corporation's market capitalization, which is a significant driver of a case's estimated damages and therefore any eventual settlement amount. If these cases start off with better facts and higher estimated damages, the court should take that into account in awarding attorneys' fees.

A final point of comparison for the lead counsel firms is their mean and median settlement amounts. As detailed above, the top-tier firms have mean settlements over $30 million, while the mid-tier firms have mean settlements between $9 and $30 million and the bottom-tier firms have mean settlements below $9 million. Looking within these bands, however, shows just how different the tiers are from each other. The following chart shows the average of the mean and median settlement numbers for each tier of lead counsel firms.[138]

---

[138] To compute the average of the mean settlements, we compute the mean settlement amount for each law firm and then compute the average of this mean for law firms in each tier. To compute the average of the median settlements, we first compute the median settlement amount for each law firm and then compute the average of these medians for law firms in each tier. We did not include the mean or median numbers for the merger objection firms, as some of these firms did not have any settlements despite filing many cases.

The differences in the average of the mean settlements for law firms between (a) the Top-Tier Firms and (b) the Mid-Tier, Bottom-Tier, and Merger-Objection Firms are all significant at

Table 3: Mean and Median Average Settlements for Law Firm Tiers

	Average of the Mean Settlements	Average of the Median Settlements
Top-Tier Firms	$76.5 million	$20.7 million
Mid-Tier Firms	$13.3 million	$8.2 million
Bottom-Tier Firms	$5.2 million	$3.1 million

This table documents the much larger settlements obtained by the top-tier firms. Top-tier firms have an average of the mean settlements of $76.5 million, nearly six times higher than the average of the mean settlements of mid-tier firms and nearly fifteen times higher than the average of the mean settlements of bottom-tier firms.

Yet comparing the average of the mean and median settlements for the top-tier firms shows that even top-tier firms do not regularly obtain nine-figure settlements. The top-tier firms' average of the mean settlements is $76.5 million, far higher than their average of the median settlements of $20.7 million. For nearly all firms, including those in the top tier, their typical cases are much smaller than the mega-settlements that make the front pages of the *Wall Street Journal*. The billion-dollar settlements in cases against companies like Enron or Petrobras may function as a lottery ticket of sorts,[139] substantially increasing a firm's revenue in a particular year, but not reflecting the firm's bread and butter caseload. For the mid and bottom-tier firms, in contrast, their average of the mean settlements is not that much higher than their average of the median settlements, reflecting the fact that these firms rarely get a lead counsel spot in the mega-settlement cases and therefore they are less likely to draw a winning lottery ticket.

Two other broad observations emerge from these comparisons. First, these comparisons cast some doubt on the cases filed by the mid- and bottom-tier firms. The cases filed by the firms in these tiers are less likely to involve traditional indicia of fraud, less likely to include an institutional lead plaintiff, and are resolved sooner. It does not follow that any

the 1% level. The differences in the average of the median settlements for law firms between (a) the Top-Tier Firms and (b) the Mid-Tier, Bottom-Tier, and Merger-Objection Firms are significant at the 1%, 1%, and 5% levels respectively.

[139] The settlements in the lawsuits against Enron and Petrobras were among the top ten settlements among all securities class actions since the passage of the PSLRA. *See, e.g.*, Top Ten by Largest Settlement, Securities Class Action Clearinghouse, at https://securities.stanford.edu /top-ten.html. As we discuss below in Part IV(B)(1), however, approximately 10 percent of settlements in securities class actions are greater than $50 million, creating a potential for a very large recovery in a significant number of cases.

specific case is necessarily frivolous, as cases can involve legitimate allegations of fraud without these characteristics. But the cases filed by mid- and bottom-tiers firms are more likely to be dismissed, and those that settle are likely to do so for smaller amounts.

Second, the cases filed by the merger objection firms are altogether different from more traditional securities class actions. Merger objection cases typically allege that the target corporation failed to disclose material information about the merger. The objective indicia of fraud are different in these types of cases because there is unlikely to be a government investigation or restatement regarding these types of alleged omissions. Nor is the company likely to terminate any of its top officers in the midst of a merger. As detailed above, these cases also rarely include institutional plaintiffs and end far more quickly than other securities class actions.

2. Supporting Counsel

In addition to the firms that regularly serve as lead counsel, a number of firms participate in securities class actions in other capacities assisting lead counsel. These firms fall into two categories: liaison counsel and additional counsel. Of the 91 law firms that participated in at least 10 cases during our study period, 42 are either liaison counsel firms or additional counsel firms. Yet, these firms have been almost entirely overlooked in the scholarly literature, and there is little known about their business model or contributions to these cases. This section explores the roles of both types of firms.

a) Liaison Counsel

Liaison counsel firms typically have an office in the jurisdiction where the case is filed, and they are familiar with that district's practices. Liaison counsel, also called local counsel, are common in many practice areas when the law firm leading the case does not have its own lawyers in the jurisdiction. They will generally ensure that pleadings and motions comply with local rules and handle court filings. Sixteen of the 91 most active law firms in our dataset served in the liaison counsel role in at least a plurality of their cases.[140]

For some law firms, the liaison counsel role can sustain a practice. The Kendall Law Group, PLLC, for example, served as liaison counsel in 33 cases during our study period, often in cases in which Robbins Geller (the top filer in our dataset) served as lead or co-lead counsel. Kendall Law Group is a small firm based in Dallas, and the named partner is a

---

[140] *See* note 87 (discussing our methodology for determining whether a law firm is a lead counsel firm, liaison counsel firm, or additional firm counsel).

former state and federal judge.[141] According to the firm's website, its top practice area is "Texas local/liaison counsel," and the firm advertises that it is the "go to lawyer for dozens of out-of-state law firms needing Texas local, or liaison counsel in all types of litigation, including patent infringement, securities fraud, torts, class actions, whistleblower cases and complex commercial litigation."[142] The firm also served as lead counsel in two cases and additional counsel in four cases. Across all of these cases, the firm made an estimated $1.2 million in securities class actions, in addition to any amounts it makes from serving as liaison counsel other types of cases. For a small firm like Kendall Law, a steady stream of liaison counsel appointments plus a small number of other roles can provide a decent income.

Overall, however, most firms do not make very much money in this role, at least based on their share of the lodestar.[143] The firms that primarily served as liaison counsel made an estimated 1.2 percent of the total fees in our dataset. These law firms may see the liaison counsel as a small addition to a practice focused on other types of business or commercial litigation. They may also use their liaison counsel role as a way to stay connected to the securities bar to help them secure the occasional lead counsel role.

b) Additional Counsel

The final—and least transparent—role in securities class actions is the role of additional counsel.[144] In our dataset, 35.4 percent of the cases had at least one firm serving as additional counsel, and this was the most common role for 26 of the 91 top firms in our dataset served.[145] This section focuses on the firms that specialize in the additional counsel role, although as discussed in more detail later, lead counsel or additional counsel firms can also serve in the additional counsel role on occasion.[146] Unlike lead counsel or liaison counsel, additional counsel operate in the shadows of securities class actions. They are not

---

[141] *See* Joe Kendall, Kendall Law Group, PLLC, at https://kendalllawgroup.com/attorneys/joe-kendall/.

[142] *See* Practice Areas: Liaison Counsel, Kendall Law Group, PLLC, at https://kendalllawgroup.com/practice-areas/texas-local-liaison-counsel/.

[143] *See supra* notes 90-91 and accompanying text for a description of how we calculated these estimated revenue numbers. As with the additional counsel in the next section, it is certainly possible that liaison counsel firms are paid a flat fee or an agreed-upon percentage of the settlement for their services.

[144] The firms in this role may also be called "of counsel," "counsel," or counsel for a specific named plaintiff.

[145] *See* note 87 (discussing our methodology for determining whether a law firm is a lead counsel firm, liaison counsel firm, or additional firm counsel).

[146] *See infra* note 178 and accompanying text for a discussion of lead counsel firms serving in the additional counsel or liaison counsel role.

Electronic copy available at: https://ssrn.com/abstract=4350971

appointed by the court, nor do they have any formal role defined by law. Instead, they perform tasks assigned to them by lead counsel. They may be listed at the end of the signature block in the complaint. In rare instances, they may file a fee affidavit if the case settles. Otherwise, they are invisible in the litigation.

There are two types of additional counsel firms. The first assists lead counsel during the litigation itself, often billing a relatively small percentage of the total hours and providing either general litigation support or more specialized assistance. The law firm of Lowenstein Sandler LLP, for example, has only served as lead counsel in two cases since 2010, but it has served as supporting counsel in more than twenty cases. The firm is one of the top bankruptcy firms in the country,[147] and it is frequently asked to assist in securities class actions when the issuer files for bankruptcy.[148] This firm's participation in these cases benefits the shareholder class by offering specific expertise needed in the litigation. This type of additional counsel firm, however, is rare.

Most firms that regularly serve as additional counsel do not appear to bring specialized litigation expertise to the table. Unlike firms like Lowenstein Sandler that specifically state that they were brought into the case for their bankruptcy expertise, other additional counsel firms rarely explain why they were part of the litigation or what type of work they performed. They often do not report any hours toward the lodestar in the lead counsel's fee application, even if other firms in the cases worked thousands of hours.[149] In other words, there is plenty of reportable work to do in these cases, yet these law firms do not appear to be doing much of it.

What then is their role? It appears that many of these additional counsel firms help connect lead counsel firms with institutional investors willing to serve as plaintiffs in securities class actions and then oversee the relationship with the institutional investors. Take the law firm of VanOverbeke, Michaud & Timmony ("VanOverbeke"), a firm of six attorneys based in Detroit, Michigan.[150] This firm did not serve as lead counsel in any cases

---

[147] *See* Tom Corrigan, Joel Eastwood, & Jennifer S. Forsyth, *The Power Players that Dominate Chapter 11 Bankruptcy*, WALL ST. J. (May 24, 2019) (stating that "corporate bankruptcy has been dominated by a small group of law firms, which hold enormous influence over the allocation of bankruptcy assets" and identifying Lowenstein Sandler as one of those firms).

[148] *See, e.g.*, Declaration of Michael S. Etkin on Behalf of Lowenstein Sandler LLP, Oklahoma Law Enforcement Retirement System v. Adeptus Health, Inc., Case No. 17-cv-00449 (E.D. Tex. Apr. 15, 2020), at ¶2 (stating that the firm was "retained and provided services as special bankruptcy counsel for Plaintiffs and the Settlement Class in the Action").

[149] Collectively, these 26 firms had less than .05% of the total reported lodestars in these cases. Several firms reported no hours in any of their cases, and others had reported hours in only a few of their cases.

[150] *See* VanOverbeke, Michaud & Timmony, P.C., at http://vmtlaw.com/.

in our study, but it did serve as additional counsel in 49 separate cases. Several of these cases settled, and the plaintiffs' firms in the cases filed affidavits in support of their fee applications that detailed the hours they worked on the cases. In most of these cases, despite being listed as additional counsel or a similar title in the complaint, VanOverbeke did not file a fee affidavit, nor were any of its hours included in the total submitted to the court.[151] Put another way, VanOverbeke was part of the legal team, but lead counsel did not bill its work to the class.

The firm appears to connect lead counsel firms to pension funds and then keep the pension funds updated on the progress of the litigation. VanOverbeke's website states that it provides "quality legal services and administrative support to public employee pension systems,"[152] and the bios of the firms' named partners state that they serve as general or legal counsel for various public employee retirement systems.[153] The website also states that the firm offers oversight of securities class actions and "litigation counsel due diligence."[154] They often appear as additional counsel in cases in which a Michigan public pension or retirement fund is one of the lead plaintiffs.[155]

Lead counsel firms likely developed relationships with additional counsel firms as a response to the PSLRA's presumption that the lead plaintiff is the shareholder applicant with the largest financial interest in the litigation. This provision makes it difficult for law firms to be appointed lead counsel in high-value cases without a stable of institutional investors willing to serve as lead plaintiff.[156] Many law firms have in-house departments

---

[151] *Compare* Amended Class Action Complaint for Violation of Federal Securities Laws, In re Skilled Healthcare Group, Inc. Securities Litigation, Case No. 09-cv-5416 (C.D. Cal. Jan. 12, 2010), at 43 (listing VanOverbeke, along with three other law firms, in the signature block of the complaint) *with* Declaration of Laurence Rosen in Support of Plaintiffs' Motion for Final Approval of Settlement, Case No. 09-cv-5416 (C.D. Cal. Nov. 1, 2010), at 17 (listing lodestar figures for each of the firms listed in the complaint except for VanOverbeke).

[152] *See* VanOverbeke Michaud & Timmony, at http://vmtlaw.com/.

[153] *See* Michael J. VanOverbeke, at http://vmtlaw.com/ michael-j-vanoverbeke/ (stating that he "specializes in Public Employee Pension Trust Funds and serves as general or special legal counsel for numerous public employee retirement systems"); Thomas C. Michaud, at http://vmtlaw.com/thomas-c-michaud/ (stating that he serves as "legal counsel to numerous public employee retirement systems and retiree health care plans").

[154] Services, at http://vmtlaw.com/services/.

[155] For example, in a securities class action filed against L-3 Communications Holdings, Inc., one of the lead plaintiffs was the City of Pontiac General Employees' Retirement System, which is based in Auburn Hills, Michigan. *See* Contact Us, Pontiac General Employees' Retirement System, at https://pontiacgers.azurewebsites.net/#tab11. VanOverbeke is listed as additional counsel in the complaint. *See* Second Consolidated Amended Complaint, Patel v. L-3 Communications Holdings, Inc., Case No. 14-cv-06038 (S.D.N.Y. Mar. 13, 2015), at 68. Yet only Robbins Geller, which was lead counsel in the case, filed a fee affidavit when the case settled.

[156] Some of the law firms listed as additional counsel do not appear to have relationships with public pension or union funds. These law firms may bring individual investors to lead

focused on developing these relationships, often through the portfolio monitoring services discussed in Part I.[157] The connections with these supporting firms, however, suggests that some firms outsource this client recruitment and communication. Firms that file a high volume of cases may need to have both an in-house department focused on cultivating clients and relationships with additional counsel firms to build a sufficiently large stable of clients.[158]

Unlike the other categories of law firms, we cannot estimate the revenue of the law firms that regularly serve as additional counsel. As noted above, these law firms rarely submit fee affidavits to the court as part of the fee application, and therefore their hours and lodestars are not publicly available. We conjecture this is because the firms surmise that courts will be skeptical of requests to directly pass on to the shareholder class the law firm's own client development costs.[159] The few published cases addressing these relationships suggest that additional counsel firms enter into flat fee or percentage agreements with lead counsel and therefore are not compensated based on their

---

counsel firms. For example, the Law Offices of Howard G. Smith has served as additional counsel more than twenty times. The firm often does not file a fee affidavit, so it is difficult to know what work it performs in these cases, but the firm's website states that investors "can join a securities fraud class action lawsuit simply by filling out a form online" and that "generally, absolutely nothing" is expected of investors who join a securities fraud class action lawsuit. *See* Law Offices of Howard G. Smith: Frequently Asked Questions About Securities Fraud Cases, at http://www.howardsmithlaw.com/SecuritiesFraud.html.

[157] *See, e.g.,* About: Donald R. Hall, Kaplan Fox, at https://www.kaplanfox.com/about/attorneysandstaff/partners/donaldrhall.html (stating that Mr. Hall "is actively involved in maintaining and establishing the Firm's relationship with institutional investors"); People: Anatoli van der Krans, Bernstein Litowitz Berger & Grossmann, at https://www.blbglaw.com/people/anatoli-van-der-krans.

[158] For example, the additional counsel firms in our study included the law firm of Cavanaugh & O'Hara. William Cavanagh, the former named partner of this firm, is now employed at Robbins Geller, working with the firm's "Institutional Outreach Team." *See* William K. Cavanagh, Jr., at https://www.rgrdlaw.com/attorneys-William-K-Cavanagh-Jr.html#Practice-Areas. Robbins Geller also employs David Hoffa, who appears to be the grandson of Jimmy Hoffa and who has served "as a liaison to over 110 institutional investors in portfolio monitoring, securities litigation, and claims filing matters." *See* David J. Hoffa, at https://www.rgrdlaw.com/attorneys-David-J-Hoffa.html; *see also* Sworn Answers to Requests for Additional Submissions, SEB Investment Mgmt. AB v. Symantec. Corp., Case No. 18-cv-02902 (N.D. Cal. Mar. 29, 2021) ("Robbins Geller employs David J. Hoffa—the grandson of James R. Hoffa, the former president of the International Brotherhood of Teamsters ("Teamsters") and the son of current Teamsters' general president James P. Hoffa—and Robbins Geller and its predecessor firms have represented the Teamsters' pension fund, Central States, Southeast and Southwest Areas Pension Fund, as lead counsel in numerous securities class actions.").

[159] Indeed, the fees paid to additional counsel appear to fall between the cracks of the various types of payments disclosed to the court. They are typically not part of the fee affidavits filed as part of the lodestar calculation, nor are they reported as part of the lead plaintiff's reimbursable costs and expenses.

lodestars.[160] The limited reporting on these relationships also suggests that some institutional clients may not even know how much money additional counsel firms receive for introducing them to lead counsel firms and managing the relationships.[161] As a result, these firms stay almost entirely under the radar.

Additional counsel firms may still provide value to the class if they help lead plaintiffs oversee the litigation, especially for smaller institutions that do not have their own in-house counsel. Indeed, courts that have reviewed these relationships have held that it is "not unreasonable" for lead plaintiffs to delegate the management of securities class actions to external counsel.[162] Yet these relationships also have the potential to be a cover for finders' fees that simply compensate additional counsel firms for introducing lead counsel firms to institutional clients. As discussed above, law firms need to build relationships with institutional investors to win the lead counsel spot in the most lucrative securities class action. In at least some cases, lead counsel firms have paid firms with pre-existing relationships with these investors a finder's fee for an introduction to these clients.[163] These introductions benefit the lead counsel firm because it helps them build their client base and secure lead counsel roles, but they typically do not benefit the class as a whole. If the relationship is not disclosed to the court, there is no opportunity for a judge to determine whether an additional counsel firm is providing legitimate legal services that benefit the class or whether it is receiving a more questionable fee from the settlement fund for introducing lead counsel to institutional clients.

As this section demonstrates, the business models of law firms are far more varied than the scholarly literature theorizes. Instead of two tracks of law firms, one filing cases that end with extremely large settlements and the other filing smaller cases, our research demonstrates that there are four different models of lead counsel firms, each focusing on its own slice of the market. Additionally, there are other law firms that focus on non-lead roles

---

[160] *See* Declaration of Hannah Ross and Joseph E. White III, In re Wilmington Trust Secs. Litig., Case No. 10-cv-00990 (D. Del. Sept. 17, 2018), at 77 (referencing an agreement to pay additional counsel representing two pension funds 4.5 percent of the total fee award).

[161] *See, e.g.*, David Axe, *The Class Action Industrial Complex*, FORBES (Sept. 20, 2004) (stating that fund trustees of the Jacksonville Police & Fire Fund seemed largely unaware of Klausner's arrangement' with the law firm of Bernstein Litowitz to receive a "cut of lawyer fees for work on cases he refers to class action firms," relying for example on one trustee who stated about its lawyer, "He's on retainer. If there's any other compensation, I'm not aware of it.").

[162] Wallace v. IntraLinks, 302 F.R.D. 310, 316 (S.D.N.Y. 2014).

[163] *See, e.g.*, Arkansas Tchr. Ret. Sys. v. State St. Bank & Tr. Co., 512 F. Supp. 3d 196, 211–12, 215 (D. Mass. 2020) (finding that the lead counsel firm of Labaton Sucharow had agreed to pay "a lawyer who had done no work on this case, . . . an ethically impermissible finder's fee" after "Labaton asked Chargois . . to find institutional investors in the Southwest for Labaton to represent in class actions, and to influence them to hire Labaton").

as liaison counsel and additional counsel. This complex ecosystem complicates our understanding of this area of law. In the next section, we build on these models to examine the litigation portfolios of plaintiffs' law firms.

B. Litigation Portfolios

As discussed in Part 1(A), conventional wisdom holds that plaintiffs' law firms view their cases as a single litigation portfolio, making decisions in individual cases in light of their overall caseload.[164] Scholars have long speculated that contingency fee firms try to manage their caseload to smooth out their financial returns.[165] Yet there is little data on whether and to what extent they are able to do so.

Law firms that work on a contingency fee basis can have a far more volatile revenue stream than lawyers who work on a per-hour or flat fee basis. If a contingency fee firm wins a number of cases in one year, its revenue will substantially increase. But a run of bad luck in the next year could cause its revenue to plummet. Class action litigation is one of the few areas of law for which contingency fees are public because they are awarded by the court. Data on these fees across time can therefore tell us how well firms smooth out their revenue in contingency fee practices.

The analysis in this section focuses on the forty-two law firms that primarily served as lead counsel (excluding merger objection firms[166]). Most of the revenue earned from securities class actions goes to lead counsel firms,[167] and the revenue earned by firms as liaison or additional counsel or earned in merger objection cases is often not disclosed to the court.[168] Overall, the law firms analyzed in this section had a total of 3,128 roles in securities class actions in our dataset, allowing analysis of estimated firm revenue and caseloads over time.[169]

---

[164] *See supra* notes 35-36 and accompanying text.

[165] *See, e.g.*, David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALA. L. REV. 335, 368 (2012) ("some firms utilize the 'portfolio' theory, which involves accepting more cases to smooth out the risk").

[166] We excluded merger objection firms from this discussion because the mootness fees paid in these cases are not public and therefore we are unable to estimate these firms' annual revenue. Our 42 law firms include the firms in the Top, Mid, and Bottom tiers as categorized in Table 1, supra.

[167] *See supra* Part III(A)(1)(a)(4).

[168] *See supra* notes 151, 160-161.

[169] This figure is larger than the number of total cases because many cases had two or more firms serving as co-lead counsel and/or lead counsel firms serving in roles other than lead counsel.

To measure revenue volatility, we calculated the revenue coefficient of variation for each lead counsel firm. The revenue coefficient of variation is the standard deviation of revenue for a particular firm divided by the mean revenue for that firm, a measure that normalizes the variation across law firms with different average revenue.[170] The revenue coefficient of variation allows us to compare the volatility of law firm revenue even if firms have very different average settlements and annual revenue. We calculated the revenue coefficient of variation for each firm in two ways—first, using all revenue observations between 2010-2018,[171] and second, to adjust for outliers, omitting the highest and lowest revenue observations during the 2010-2018 period for each law firm.[172] We call the first measure the "full coefficient of variation" and the second measure the "adjusted coefficient of variation."

Which lead counsel firms are most successful at smoothing out their revenue? It is not surprising that Robbins Geller, which filed more than twice as many cases as any other firm in our dataset, was also among the most successful at smoothing out its revenue.[173] Both its full coefficient of variation (50.3%) and its adjusted coefficient of variation (40.6%) are among the smallest of the lead counsel firms analyzed here.[174] Even Robbins Geller, however, experienced fairly significant revenue swings from year-to-year. Focusing on estimated revenue earned in 2010 through 2018, Robbins Geller's revenue ranged from a low of $37.2 million to a high of $175.5 million. During this same time period, Bernstein Litowitz, which had the second-highest total estimated revenue in our study, also had a relatively low full coefficient (59.9%) and adjusted coefficient of variation (48.9%). Yet its

---

[170] Reported as a percent, the coefficient of variation indicates the percentage of the mean that corresponds to one standard deviation. For example, if the mean of a distribution is 100 units and the coefficient of variation is 20% then one standard deviation corresponds to 20 units. A higher coefficient of variation means that one standard deviation corresponds to a greater distribution spread relative to the mean.

[171] *See supra* note 91 (explaining why annual revenue calculations are limited to the 2010-2018 time period). We omitted individual years at the start of the study period if the law firm had not yet started filing securities class actions, as well as individual years at the end of the study period if the law firm had stopped filing securities class actions.

[172] We calculated the adjusted coefficient of variation to adjust for the fact that a firm may have a single abnormally large settlement that skews its average revenue.

[173] Only the law firm of Labaton Sucharow LLP had a lower coefficient of variation. Labaton had the third highest total revenue in our study, behind Robbins Geller and Bernstein Litowitz.

[174] As a point of comparison, we calculated the coefficients of variation for the top 25 defense firms listed in the American Lawyer. *See, e.g.*, The 2022 Am Law 200: Ranked by Gross Revenue, American Lawyer (May 24, 2022). Between 2010 and 2018, the coefficient of variation of these firms averaged 0.144, compared to an average of 1.23 for the top-tier plaintiffs' firms in our study or 1.407 for the lead counsel firms (other than merger objection firms).

estimated earnings still ranged from a low of $43.7 million to a high of $214.7 million. Firms can try to smooth out their revenue, but the reality of a contingency fee practice makes this difficult, even for the busiest firms.[175]

What strategies are associated with lower revenue volatility? Although a full analysis is beyond the scope of this Article, we find that lower adjusted coefficients of variation are associated with a larger number of cases in which a firm serves as lead or co-lead counsel. Figure 9 provides a scatterplot of the adjusted coefficient of variation for each lead counsel firm and the number of cases in which the lead counsel firm acted as lead or co-lead counsel. We include in Figure 9 the predicted adjusted coefficient of variation from a regression of adjusted coefficient of variation on the number of cases in which a firm was lead or co-lead counsel (the "Fitted Values").[176] As depicted in Figure 9, law firms that file more cases have less variation in their revenue from year to year. This observation is intuitive and fits with the scholarly understanding of how firms can smooth out their revenue.
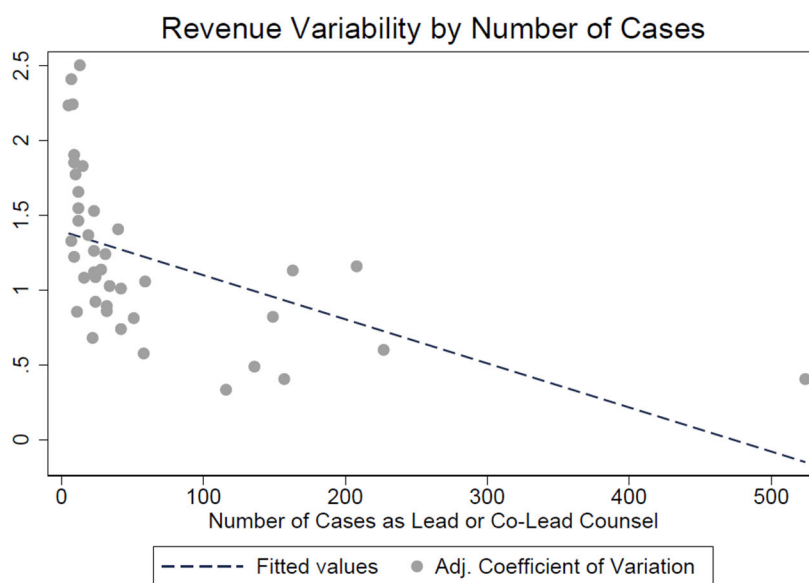
Figure 9

Firms can also use different roles in securities class actions to help them smooth out their revenue. They can, for example, share the lead counsel role with another law firm so

---

[175] The average coefficient of variation for top-tier firms was 123.1%. For mid-tier firms, it was 150.4%, and for bottom-tier firms, it was 151.3%. As explained below, the top-tier firms tend to file more cases, which likely explains their smoother revenue. The mid- and bottom-tier firms may rely more on other types of cases to smooth out their revenue.

[176] In the regression model, the coefficient on the number of cases in which a firm was lead or co-lead counsel is negative and significant at the 1% level. The adjusted R-squared for the model is 0.1522.

45

that the two firms can share the financial risk from the litigation. Overall, 27.9 percent of the cases in our dataset had two firms serving as co-lead counsel, while 2.3 percent had three or more firms sharing this role. Law firms can also serve as additional counsel to get a small piece of other cases.[177] These strategies allow a law firm that might only be able to serve as sole lead counsel in a few cases each year to have a piece of several additional cases.

The data support the theory that lead counsel firms serve in these roles to spread out their financial risk. As noted above, not a single one of the 91 most active law firms served exclusively as lead counsel during our study period.[178] Every firm served in at least one case as either liaison counsel or additional counsel.

Table 4: Roles and Revenue

Business Model	Percentage of Cases as Liaison Counsel	Percentage of Cases as Additional Counsel	Percentage of Estimated Revenue from Non-Lead Cases
Top-Tier	8.2	16.7	8.8
Mid-Tier	9.1	20.0	14.9
Bottom-Tier	10.5	26.0	18.4
Merger Objection	3.8	11.0	N/A

As Table 4 indicates, the lead counsel firms in the top tier serve in these other roles in approximately a quarter of their cases, primarily as additional counsel. Although these roles are less lucrative than the lead counsel role, they still make at least some of their revenue from these roles.

The mid-tier and bottom-tier lead counsel firms rely even more heavily on these other roles to supplement their revenue. The bottom-tier firms served as additional counsel or liaison counsel in an average of 36.5 percent of their cases, primarily as additional counsel.

---

[177] Courts are not always pleased to learn about these revenue-sharing agreements, especially when these agreements are not disclosed to the court. *See, e.g.*, In re Allergan PLC Sec. Litig., No. 18CIV12089CMGWG, 2020 WL 5796763, at *8 (S.D.N.Y. Sept. 29, 2020) (rejecting class counsel because "full transparency required advising the Court that, despite its ruling [appointing a single firm as lead counsel], two law firms intended to continue working on this matter, and had entered into a fee-sharing arrangement").

[178] *See infra* note 87 and accompanying text.

These figures reflect that some bottom-tier firms have a bifurcated business model. They serve as lead or co-lead counsel in the less lucrative cases, and then they serve as additional or liaison counsel in the bigger cases led by other firms. These varied roles add revenue and also diversify their risk.

This finding is supported by data showing that firms use different roles to get a piece of larger cases. On average, the cases in which firms serve as additional counsel end with larger settlements than the cases in which the same firms serve as lead counsel, as Table 5 below indicates.[179]

Table 5: Mean Settlement Amounts by Role

Business Model	Average of the Mean Settlements as Lead (in $ millions)	Average of the Mean Settlements as Additional Counsel (in $ millions)	p-value from t-test of Difference
Top-Tier	76.5	158.7	0.0788
Middle-Tier	13.5	200.6	0.0258
Bottom-Tier	5.2	49.9	0.0569

Even if a firm does not have the stable of institutional clients to get appointed as lead counsel in a lucrative case, it may still be able to participate in a non-lead role. A bottom-tier firm, for example, might serve as lead counsel in fairly small cases, but then serve as additional counsel in much larger cases led by the top-tier firms. These different roles help firms diversify their caseloads and smooth out their revenue.

---

[179] We compute the mean settlement amount for each law firm in cases where the law firm was lead or co-lead counsel. We then compute the average of the mean settlements for law firms in each tier (termed the "Average of the Mean Settlements as Lead"). We also compute the mean settlement amount for each law firm in cases where the law firm was additional counsel. We then compute the average of the mean settlements for law firms in each tier (termed the "Average of the Mean Settlements as Additional Counsel"). The p-values are from t-tests of the difference in Average of the Mean Settlements as Lead and Average of the Mean Settlements as Additional Counsel for law firms in each tier respectively. For example, the t-test of the difference in Average of the Mean Settlements as Lead and Average of the Mean Settlements as Additional Counsel for law firms in the Top-Tier is 0.0788.

IV.   JUDGING LAW FIRMS

Part III presented data on the diverse business models of the plaintiffs' law firms that regularly participate in securities class actions. This data is a necessary starting point in helping judges and lead plaintiffs evaluate these firms, as it gives them a framework to determine where individual firms fit within the broad tiers of securities class action law firms. Yet judges and lead plaintiffs also need to compare firms within tiers. In selecting a lead counsel firm, for example, how should a lead plaintiff choose between one top-tier firm and another? And how should judges decide how much a specific firm should be compensated if the case settles? This Part provides guidance on these questions, first using empirical data to explain how judges and lead plaintiffs can evaluate law firms' track records to choose among the firms seeking to serve as lead plaintiff. We then offer empirically based recommendations to assist judges and lead plaintiffs in setting appropriate fee awards.

A. Selecting Law Firms

As discussed in Part 1(B), in selecting one or more law firms to serve as lead counsel, lead plaintiffs and judges do not always have access to the data they would need to compare the track records of specific firms. Firms typically include their firm bios in RFPs and lead counsel motions, but these bios highlight the firm's best results. They are sales pitches, and no one includes their failures in their sales pitches. As we discussed in connection with our discussion of RFPs, investors vary widely in their approach to selecting counsel.[180] Some large institutional plaintiffs do a deep dive into firms' qualifications, but others do not. Those limitations set the stage for the focus of this section: How can lead plaintiffs and judges evaluate the track records of competing law firms? As this subpart explains, they should request that law firms disclose four specific types of information in RFPs and lead plaintiff motions: mean settlement size, median settlement size, settlement range, and settlement outcome.

1.   Mean and Median Settlement Size

In selecting one or more law firms to serve as lead plaintiff, judges and lead plaintiffs should request information about the firms' mean and median settlements. This information is not currently provided as a standard part of the selection process. Instead, law firms typically list their largest settlements in firm biographies and websites, even though these settlements often vary considerably from the firms' more typical results. Table 6 below

---

[180] *See supra* notes 40-48 and accompanying text.

48

compares the highlighted settlements with mean and median settlement amounts for several law firms.[181] Specifically, Table 6 provides the largest and smallest settlements that firms chose to highlight in their bios, along with the firms' mean and median settlements in the cases in which the firm served as lead or co-lead counsel in our dataset.[182] As discussed above,[183] we do not name the specific firms in this Part, as our focus is on the broader market practices rather than on the performance of specific law firms. But these firm biographies were all attached to lead counsel motions in cases in our study, so they were submitted to the court as part of its review in selecting a lead counsel firm.

Table 6: Comparing Firm's Touted and Actual Settlement Amounts

Law Firm	Largest/Smallest Settlements Referenced in Firm Bio	Mean Settlement Amount	Median Settlement Amount
Firm 1	$7.2 billion/$50 million	$47.5 million	$13.1 million
Firm 2	>$1 billion/$97.5 million	$55.2 million	$15.8 million
Firm 3	$6.19 billion/$100 million	$155.7 million	$36.5 million
Firm 4	$3 billion/$17 million	$53.7 million	$7 million
Firm 5	>$600 million/$42.875 million	$15 million	$17 million
Firm 6	$79 million (only settlement figure referenced)	$7.3 million	$3 million
Firm 7	$280 million/$11 million	$14.6 million	$10.0 million
Firm 8	$29.7 million/$414,500	$7.4 million	$2.5 million

Table 6 confirms the point made earlier—when making a pitch in a lead counsel fight, most law firms highlight their best recoveries, not their more typical recoveries. Only one firm in the table took a different approach, including a lengthy (and presumably more

---

[181] Our focus here is on settlements, as securities fraud class actions almost never go to trial. *See supra* notes 76-77 and accompanying text.

[182] In reviewing these bios, we focused exclusively on concluded cases in the portions of the bio focused on the firm's experience, rather than the experience of individual lawyers at the firm. We did not include settlements in this table if the amount of the settlement is not included in the firm bio. We used firm bios submitted to the court in 2018, as our study ends with cases filed in 2018.

[183] *See supra* note 84 and accompanying text.

representative) list of settlements in their firm bio with short descriptions of nearly 100 settlements that the firm had obtained.

To be clear, firms do not violate any rules in highlighting their best cases in their firm bios. Nor do we think the firms included in Table 6 are any different than most of the other firms that practice in this area. The lead counsel selection process is almost entirely unregulated, and the law offers little guidance for lead plaintiffs and judges trying to choose among firms.[184] Given that lead plaintiffs and judges are not specialists in this area, they may not know the right information to request from law firms. It is therefore not surprising that law firms selectively pick and choose which parts of their track record to promote. As this table reflects, however, judges and lead plaintiffs need more than a firm's highlights when selecting lead counsel. They need figures that better reflect the firm's full track record.[185]

Table 6 also demonstrates why lead plaintiffs and judges need both a firm's mean and median settlements to understand a firm's track record. For firms that file high-value cases, their mean settlement amount will almost always be far higher than its median settlement amount, as the rare mega-settlement in a firm's portfolio can significantly increase its average. A firm should get credit for these outliers, as they do produce substantial compensation for shareholders, but the median figures should be provided as well to reflect a firm's more typical results.

2. Settlement Range

Judges and lead plaintiffs should also request information about a law firm's settlement range. Mean and median settlement size, while valuable information, can obscure the range of settlement outcomes that firms obtain. As an extreme example, a firm with settlements routinely in the $40 million range may look different than a firm with a bimodal distribution of $10 million and $70 million settlements. As one example, two top-tier firms in our study have similar mean settlements ($55.2 million and $53.7 million respectively), but their settlement distribution is quite different. Table 7 reports the firms' settlement ranges, including the settlements amounts (in millions of dollars) for the two firms at different percentiles of the settlement amount distribution for each firm.

---

[184] *See supra* Part I(B).

[185] *See supra* note 84 and accompanying text.

Table 7: Settlement Amount Distributions of Two Law Firms

	10th percentile	25th percentile	50th percentile	75th percentile	90th percentile
Firm 9	5.5	7.5	15.8	42.5	173.5
Firm 10	1.3	2.5	7.0	19.8	38.5

From these very different settlement ranges, one would not guess that the firms have nearly identical mean settlements. The first firm has larger settlements across the range. The second firm, in contrast, has a steadier range of settlements within a narrower band. Indeed, nearly all of the second firm's settlements are less than $30 million, reflecting that a few large settlements substantially increased its average. The firms' median settlement amounts ($15.8 million and $7 million respectively) suggests that the firms have different litigation portfolios, but the settlement range brings these differences into greater focus. Both firms are in the top-tier of law firms filing securities class actions, but for a lead plaintiff choosing between the two firms, this additional information may be helpful in understanding the firms' different track records.

3. Settlement Rate

Finally, lead plaintiffs and judges should also ask competing firms for their settlement rates, or the percentage of a firm's cases in which it was lead or co-lead counsel that ended in a settlement. As discussed above, trials or other forms of judgment are exceptionally rare in this practice area, and therefore settlements are the primary way that shareholders receive compensation for losses as a result of fraud. Knowing how likely a law firm is to achieve this outcome should be at the top of plaintiffs' minds.

Our data shows that firms with very similar mean settlements can have very different settlement rates. For example, four law firms in our study have average settlements between $7.3 and $7.6 million, making them appear quite similar at first glance. Yet the firms' settlement rates vary widely, from a high of 57 percent to a low of 25 percent. The same disparity occurs in the top-tier of law firms as well. Four top-tier firms in our study have average settlements between $53.7 million and $57.7 million, a fairly tight range. Yet their settlement rates vary from 36 percent to 73 percent. This data again demonstrates how important settlement rates are in evaluating law firms. Firms may have comparable mean settlements, but still differ considerably in how likely they are to achieve these settlements for shareholders.

Our comparisons here deliberately focus on law firms within the same tier. If the firms operate in different law firm tiers, different settlement rates may simply reflect different incentives. All else equal, law firms working on a contingency basis have strong incentives to select cases that are likely to result in a settlement, as they only get paid if they win. But all else is not equal; the potential stakes of the litigation appear to strongly influence firms' willingness to bear the risk of a dismissal. The Figure below shows the incidence of settlement based on the distribution of the corporate defendant's market capitalization in our sample.
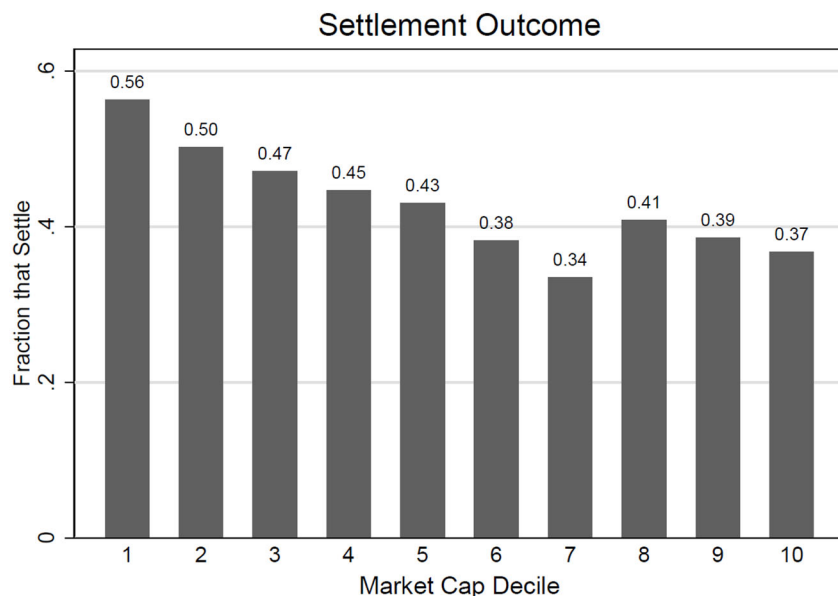

Figure 10

With some minor variation, the bigger the potential target, the lower the likelihood of settlement. In other words, swinging for home runs produces more strikeouts. This pattern likely reflects lawyers' recognition that judges are more generous with fee awards in cases that produce larger settlements, even if the larger settlement is driven principally by the defendant company's size and trading volume. As a result, firms that target larger companies may be willing to take more risks in choosing which cases to file than firms that target smaller companies. Lead plaintiffs and judges can take this fact into account when evaluating firms' records. A firm that regularly goes after more lucrative targets may have a higher dismissal rate than firms that bring smaller cases, but this difference does not necessarily mean that the firm with the higher settlement rate is a better law firm. Instead, it may simply reflect a rational difference in litigation strategy given the larger contingency fees that result from larger settlements.

As this discussion has shown, lead plaintiffs and judges should not rely on law firms to describe their own track records. Instead, they should ask the firms to report key data points—mean and median settlement amounts, settlement ranges, and settlement rates—that will allow better comparisons between firms. Lead plaintiffs and judges may still need to look behind these data points if, for example, a firm has a lower settlement rate because it targets higher-value cases, but this data can serve as a useful starting point in the lead counsel selection process.

B. *Paying Law Firms*

In addition to approving the lead plaintiff's choice of lead counsel, judges must also determine an appropriate fee award if the case settles or otherwise ends in a recovery for shareholders. The PSLRA instructs judges to limit attorneys' fees to a "reasonable" percentage of recovery, but the statute provides no guidance to define reasonableness.[186] Judges can take into account any ex ante fee agreements between the lead plaintiff and lead counsel, but prior empirical research has shown that these agreements are rare.[187] Judges are therefore left to their own intuitions in calculating a fee that appropriately compensates the lawyers for their work.[188] Our data reveals that judges' lack of information with regard to law firms' business models produces two troubling consequences for setting fees. First, fee awards often do not reflect the case's risk or the law firm's performance. Second, fee awards can overcompensate firms for hours invested later in the case—in particular, after a plaintiff survives the motion to dismiss. This section first presents descriptive data on fee awards before exploring each of these concerns with the goal of assisting judges and lead plaintiffs in setting and negotiating fee awards.

1. Descriptive Data on Fee Awards

To set the stage for the empirical observations in this section, we first provide descriptive statistics on the settlements and fee awards in our study. In presenting this data, we break the settlements and awards down by decile to illustrate their distribution by size.

---

[186] 15 U.S.C.A. § 78u-4(a)(6). The case law is similarly vague, instructing judges to consider a laundry list of factors with little guidance on weighing or ranking these factors. *See, e.g.*, Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000) (providing a list of "traditional criteria" that courts should use in setting fees in contingency cases).

[187] *See* Lynn A. Baker et. al., *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1389-90 (2015).

[188] *See supra* notes 70-77 and accompanying text.

Figure 11 reflects the mean settlement amount in millions at each decile of the distribution, while Figure 12 shows the mean fee award in millions at each decile of the distribution.
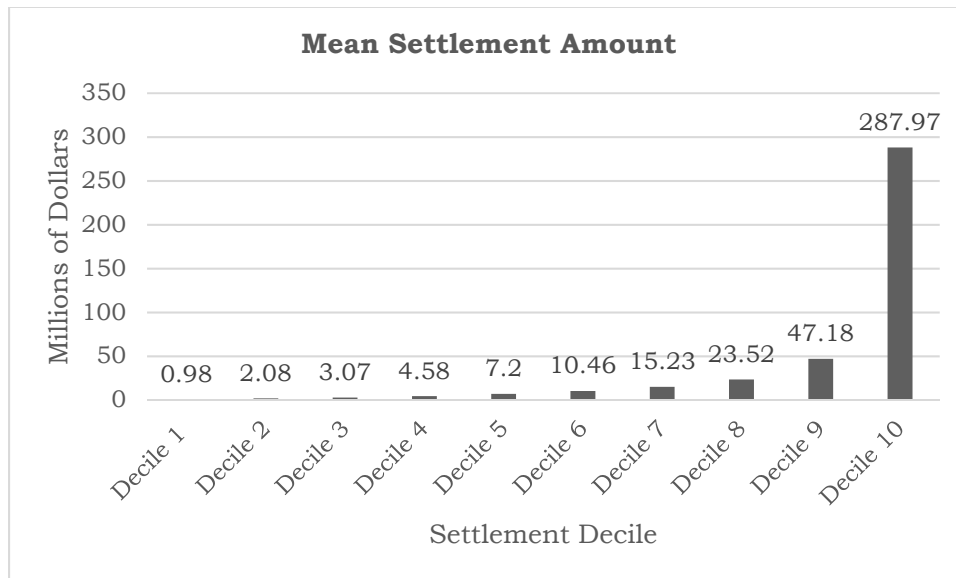
Figure 11
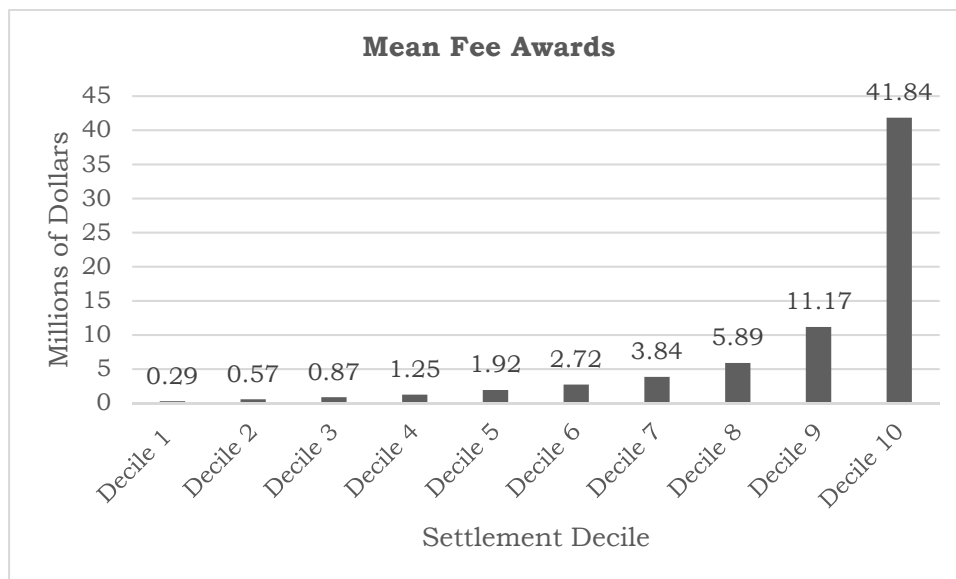
Figure 12

As these figures demonstrate, more than 90 percent of settlements in securities class actions are for less than $50 million. A $50 million settlement is a lot of money, but it pales in comparison to the nine-figure settlements in the top decile. Overall, most of the money in securities class actions comes from these mega-settlements in the top decile. Indeed, a law firm could obtain nine settlements, one in each of the first nine deciles of the settlement

54

distribution, and still not make nearly as much money as a law firm with a single settlement in the top decile. These data reflect the winner-takes-most reality in securities class actions, and it helps explain why law firms put in such effort to court the institutional investor clients who are in the best position to win the lead plaintiff spot in these top settlements.

Our data also confirms that judges award smaller fee percentages as the settlement amount increases, which is consistent with case law.[189] As Figure 13 below reflects, however, this approach is not uniform, especially in the lower settlement deciles.
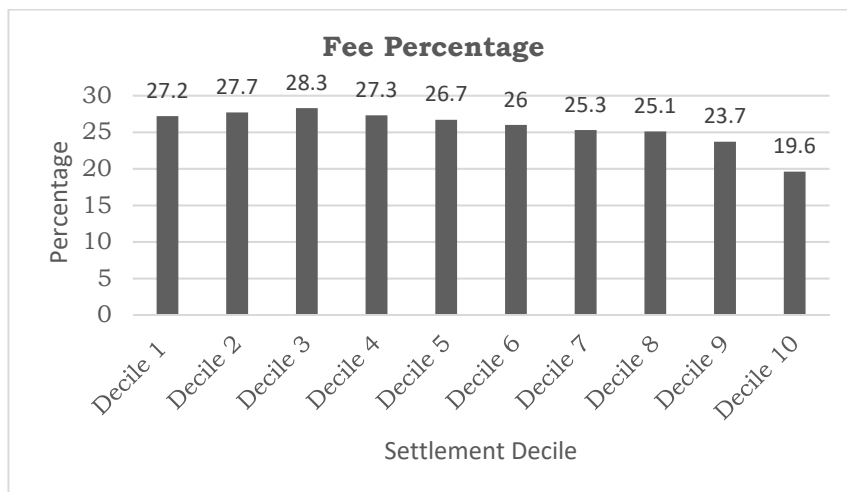

Figure 13

When the case settles for an amount in the lowest decile, judges use a slightly lower percentage in setting the fee award than they might if the settlement was in the second or third decile. These differences, however, are not statistically significant. As the settlements get into the top deciles, however, judges use substantially lower fee percentages, likely recognizing that higher percentages of mega-settlements could result in a windfall for the attorneys. The difference between the fee percentage in Deciles 1 and 10 is significant at the 1% level.

Finally, and perhaps less intuitively, judges use a higher multiplier as the settlement amount increases. In setting fees in securities class actions, the PSLRA instructs courts to award a "reasonable percentage" of the settlement amount, but courts typically use a lodestar cross-check to ensure that the award does not result in a windfall for the law firms.

---

[189] In re Cardinal Health Inc. Sec. Litigations, 528 F. Supp. 2d 752, 763 (S.D. Ohio 2007) ("Because recovery is partially the result of class size, and not just attorney skill, the percentage awarded ordinarily should decrease as the amount of the recovery rises, particularly in 'mega-fund' cases where the recovery is above $100 million.").

Electronic copy available at: https://ssrn.com/abstract=4350971

Although some academics have argued that courts should abandon use of the lodestar,[190] we find that lodestars are still quite relevant in federal court. In our dataset, plaintiffs' counsel provided their lodestar in 96.8 percent of the attorney fee motions in settled cases. We cannot tell how much these lodestars figured into the court's analysis, as courts regularly enter the proposed fee order written by counsel rather than engaging in their own written analysis, but presumably law firms submit their lodestar because they think that it will be relevant to the judges that set these fees.

In performing a lodestar cross-check, judges try to ensure that the multiplier they use on the lodestar is comparable to multipliers in similar cases. Figure 14 shows the multipliers in the settlements in our study, again sorted by settlement decile. The difference between the mean multiplier in Deciles 1 and 10 is significant at the 1% level.

Mean Multiplier, by Settlement Decile
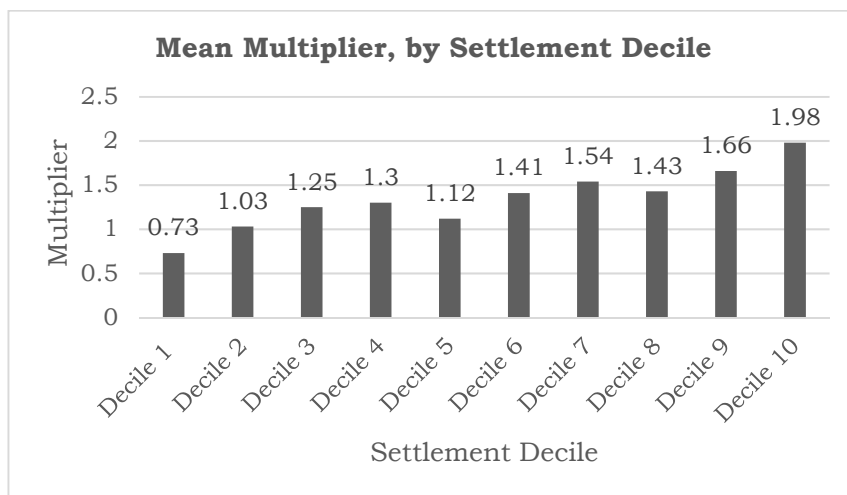
Figure 14

A few points from these data bear noting. First, the mean multiplier for the lowest decile of settlements is less than one, which means that the fee award is less than the reported value of the time that the plaintiffs' firms invested in the case. Again, this suggests that courts are skeptical of settlements at the bottom end of the range, presumably because they produce little compensation for shareholders. Second, the mean multiplier increases substantially in the top two deciles. As the settlements get larger, judges are willing to give plaintiffs' firms

---

[190] *See* Charles Silver, *Due Process and the Lodestar Method: You Can't Get There from Here*, 74 TUL. L. REV. 1809 (2000) (referencing a "broad consensus that percentage-based formulas harmonize the interests of agents and principals better than time-based formulas like the lodestar approach").

a larger return on the time they invested in their cases. This outcome is surprising, given the declining fee percentages seen in Figure 13. Putting these two figures together reveals that, although judges award a lower percentage of the settlement amount in the cases with the largest settlements, these fee awards still compensate the plaintiffs' firms more for their time than the awards for smaller settlements.

2. Fees and Firm Performance

The descriptive data above sheds light into the amount of the fee awards, but they do not tell us how courts decide on these awards. Do courts consider the appropriate factors in setting these awards? Courts uniformly hold that one of the primary factors in setting a fee award should be the riskiness of the litigation.[191] Although there is always a risk of non-recovery in a contingency fee case, courts have recognized that some cases are riskier than others and fees should be lower when a case looks promising from the outset.[192] Conversely, where the law firm is able to achieve a substantial settlement by uncovering hidden facts or putting forth difficult legal arguments, they should be rewarded with a higher fee award. Yet, there is little evidence on whether judges actually adjust fee awards based on the riskiness of the case.

To analyze this question, we estimate three OLS regressions with different dependent variables: (1) the multiplier for each case, (2) the log odds of the fee percentage for each case,[193] and (3) the log of the fee award amount in millions of dollars for each case. For our independent variables, we include the variables from Part III(A)(1)(e)(1) that increase the likelihood of settlement, including allegations of a restatement, officer termination, parallel SEC investigation, other parallel government investment, and institutional lead plaintiff. We add the log of the settlement amount, as well as dummy variables for each decile of market capitalization of the corporate defendant, using the smallest decile as the baseline category. We also include controls for the year of filing, the court, and the industry of the corporate defendant. We present the results in the table below.

---

[191] Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50, 54 (2d Cir. 2000) (stating that "we have historically labeled the risk of success as perhaps the foremost factor to be considered in determining whether to award an enhancement").

[192] *Id.* at 55 (upholding "the district court's essential finding that this was a generally promising matter for the plaintiffs right from the start").

[193] We transform the fee percentage into log odds: the log of (Fee Percentage/(1-Fee Percentage)). We do so to address the bounded nature of the fee percentage which ranges in theory between 0 and 1.

Table 8: OLS Regressions of Multipliers, Fee Percentages, and Fee Awards

	Model 1 Multiplier	Model 2 Log(Fee Percentage/(1-Fee Percentage))	Model 3 Log(Fee Award)
Log of Settlement Amount	0.338**	-0.0724**	0.764**
	(8.43)	(-4.50)	(70.87)
Log of Market Cap	0.0480	0.0346	0.0299
	(0.71)	(1.08)	(1.53)
Number of Lead Plaintiff Motions	-0.0647**	-0.0360**	-0.0161**
	(-4.60)	(-5.65)	(-4.13)
Institutional Lead Plaintiff	-0.230**	-0.0515*	-0.0536**
	(-3.46)	(-2.03)	(-3.86)
Restatement	0.144	0.0282	0.00925
	(1.54)	(0.96)	(0.56)
SEC Investigation	0.103	-0.0318	-0.00496
	(1.30)	(-1.06)	(-0.27)
Other Govt Investigation	0.0212	-0.0492+	-0.0197
	(0.27)	(-1.78)	(-1.07)
Officer Termination	-0.0744	-0.0380	-0.0222
	(-1.02)	(-1.48)	(-1.40)
Section 11	0.0355	-0.0768	-0.00460
	(0.35)	(-1.62)	(-0.16)
Section 12	-0.0477	0.0530	0.0115
	(-0.46)	(1.12)	(0.40)
Accounting Allegations	-0.0789	-0.0650	0.0493
	(-0.34)	(-0.53)	(0.46)
Merger Case	-0.0943	0.0324	0.0161
	(-1.19)	(1.08)	(0.85)
Market Cap Decile 2	0.0282	-0.0192	-0.0440
	(0.20)	(-0.39)	(-1.56)
Market Cap Decile 3	-0.121	-0.0279	-0.0726+
	(-0.67)	(-0.42)	(-1.82)
Market Cap Decile 4	-0.0413	-0.0877	-0.119*
	(-0.18)	(-1.09)	(-2.34)

58

Market Cap Decile 5	-0.118	-0.119	-0.158*
	(-0.47)	(-1.19)	(-2.54)
Market Cap Decile 6	-0.306	-0.115	-0.178*
	(-1.11)	(-0.98)	(-2.44)
Market Cap Decile 7	-0.244	-0.122	-0.130
	(-0.79)	(-0.93)	(-1.63)
Market Cap Decile 8	-0.428	-0.211	-0.196*
	(-1.20)	(-1.37)	(-2.04)
Market Cap Decile 9	-0.447	-0.189	-0.181
	(-1.09)	(-1.05)	(-1.55)
Market Cap Decile 10	-0.862	-0.417+	-0.276+
	(-1.62)	(-1.68)	(-1.86)
Constant	0.612*	-0.905**	-0.517**
	(2.37)	(-6.36)	(-6.39)
N	792	809	813
adj. R^2	0.137	0.292	0.960

t statistics in parentheses; + $p < 0.10$, * $p < 0.05$, ** $p < 0.01$

There is some good news here. For all three regressions, the coefficient for the number of lead plaintiff motions and the presence of an institutional lead plaintiff is negative and strongly significant. One additional lead plaintiff motion corresponds with a decrease in the multiplier by 0.065, a decrease in the attorney fee percentage of 0.7 percentage points,[194] and a 1.6 percent decrease in the attorney fee award. Likewise, the presence of an institutional lead plaintiff, compared with no institutional lead plaintiff, corresponds with a decrease in the multiplier by 0.23, a decrease in the attorney fee percentage of 1.0 percentage points,[195] and a 5.2 percent decrease in the attorney fee award. We conjecture that these variables correspond to a strong case at the outset because, in more promising cases, more law firms will fight for the lead counsel role and institutional investors will be more willing to participate. If the case starts out strong, a lead counsel firm should have an easier time achieving a settlement, so judges should use a smaller multiplier and award a smaller percentage of the settlement as a fee. Although we cannot establish causality in our

---

[194] We compute the marginal effect of an additional lead plaintiff motion for Model 2 at the mean of all the other independent variables.

[195] We compute the marginal effect of an institutional lead plaintiff for Model 2 at the mean of all the other independent variables.

model, these results indicate a strong correlation between a strong case and smaller multipliers and fee awards.

Similarly, the regression reveals that the size of the attorney fee award is negatively correlated with cases involving the largest corporate defendants in market capitalization Decile 10. The coefficients on Market Cap Decile 10 in Models 2 and 3 are negative and significant at the 10% levels. A corporate defendant in Market Cap Decile 10, compared with the base category of Market Cap Decile 1 (smallest market cap), corresponds with a decrease in the attorney fee percentage of 10.2 percentage points[196] and a 24.1 percent decrease in the attorney fee award. If causal, this approach makes sense. Damages reflect the market losses when the fraud is uncovered. A larger company will have correspondingly larger market losses, regardless of the skills or performance of the law firms in the resulting litigation. The data is consistent with judges awarding attorney fees that do not reward attorneys more for simply suing a larger target.

On the other hand, most of the factors that we found in Part III(A)(1)(e) to correlate with probability of recovery, including allegations of a restatement, officer termination, parallel SEC investigation and other parallel government investment, are all insignificant here. These are objective indicia going to the merits of the claims that are available at the time the complaint is filed. The lawyers filing these claims understand that these characteristics make recovery more likely. Judges, however, do not appear to take these merits characteristics into account in any systematic way when determining fee multipliers, fee percentages, or fee awards when the case is resolved.[197] Lawyers sometimes mention the *absence* of these factors in their fee applications, but having read hundreds of these applications, we have yet to see one explaining how easy recovery was because of the presence of objective indicia of fraud.

3. Fees and Risk Over Time

The PSLRA makes the motion to dismiss the key screening device for securities fraud class actions. For defendants, there is little pressure to settle prior to the resolution of the motion to dismiss because they avoid the cost of discovery until that time, so early dismissal is relatively cheap. After the motion to dismiss, however, the asymmetric burdens of discovery create substantial settlement pressure for the defendant corporation. Yet judges

---

[196] We compute the marginal effect of market cap decile 10 compared with market cap decile 1 for Model 2 at the mean of all the other independent variables.

[197] We do find some evidence that federal courts in California, which see a high number of securities class actions, use lower fee percentages and award lower fees, suggesting that courts with more experience in this practice area exercise greater restraint in setting fees.

do not consider the risk of hours invested in a case based on the timing of those hours. Instead, they generally look only at the aggregate hours reported as part of the lodestar, failing to distinguish between hours invested early in the case—i.e., prior to the resolution of the motion to dismiss—and hours invested after the case has survived a motion to dismiss. The latter hours are a considerably lower risk investment for the attorneys.

Our data strongly support this intuition. We report the mean actual multiplier we observe in our sample of cases (1.34) and the implied multiplier that would compensate for the risk of non-recovery based on the probability of settlement both prior to the motion to dismiss and for cases that survive the motion to dismiss. We determine the probability of settlement prior to the final motion to dismiss order based on the actual fraction of cases that settle unconditional on the case surviving the motion to dismiss. We determine the probability of settlement for cases where the plaintiff survives the final motion to dismiss based on the actual fraction of cases that settle conditional on the case surviving the motion to dismiss. Figure 15 below reports our results.
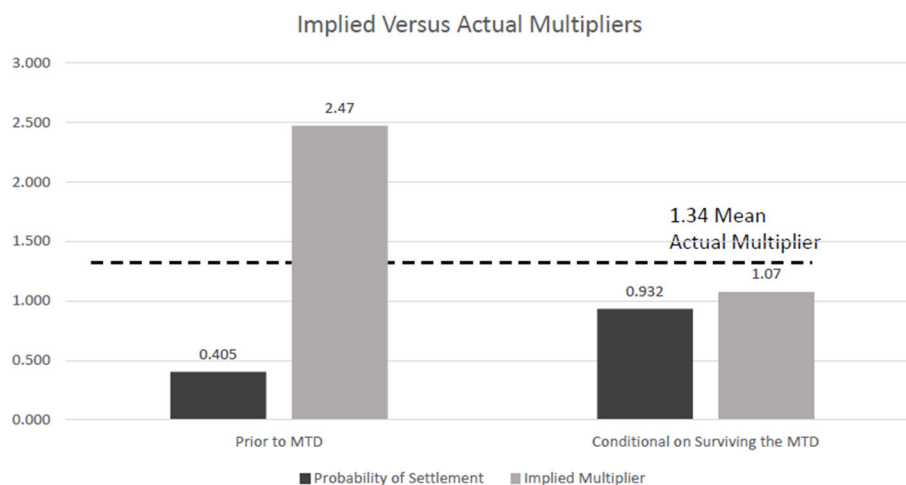

Figure 15

As Figure 15 reflects, prior to the resolution of the motion to dismiss, the probability of obtaining a settlement is only 40.5 percent. After the case survives a motion to dismiss, however, 93.2 percent end in a settlement. In other words, after the complaint has survived a motion to dismiss, something has to go dramatically wrong with a case for it not to end in a settlement. But judges do not separately consider hours invested prior to the dismissal motion from those invested afterward.

This has potentially perverse consequences for law firm incentives. Prior to the final motion to dismiss, the implied multiplier to compensate fully for risk is 2.47. If attorneys

expect to receive a mean multiplier of 1.34 based on the mean actual multiplier, this means that attorneys are undercompensated for the risk they bear for work done prior to the motion to dismiss. From the table, note that the implied multiplier to compensate for risk is 1.07 after surviving the final motion to dismiss order. This means that, if the law firm in a particular case can survive a motion to dismiss, the risk of non-recovery is largely off the table, allowing the firm to invest considerably more hours as long as it anticipates receiving a multiplier of at least 1.07 for those hours. Attorneys that expect a mean multiplier of 1.34 will thus receive greater compensation than warranted by the risk of non-settlement after surviving the final motion to dismiss order.

When judges disregard the fact that the riskiness of a case goes down as the litigation progresses, the impact is largest in the cases against the largest companies. To illustrate this point, we computed the probability of settlement and implied multiplier for cases in market capitalization decile 10 compared with the lower nine deciles. For all cases and for each market capitalization group, we determine the probability of settlement prior to the final motion to dismiss order and conditional on surviving the motion to dismiss. Table 9 reports the results.

Table 9: Implied and Actual Multipliers

	Prob of Settlement	**Implied Multiplier**	**Actual Multiplier**
MARKET CAP DECILES 0 TO 9			
Prior to Final MTD Order	0.408	2.45	1.34
Conditional on Surviving the MTD	0.935	1.07	
MARKET CAP DECILE 10			
Prior to Final MTD Order	0.368	2.72	1.43
Conditional on Surviving the MTD	0.896	1.12	

This pattern is qualitatively the same for both the top market capitalization decile and smaller deciles. Yet the gap between the mean actual multiplier (1.43) and the implied multiplier required to compensate for risk after surviving a motion to dismiss (1.12) is greatest for cases in the top market capitalization decile—indicating that the overcompensation (and thus incentive to overwork) is greatest for these cases.

V.   BRINGING LIGHT TO THE BLACK BOX

The legal system asks lead plaintiffs and judges to monitor the lawyers in securities class actions but does not give them the information they need to perform this role effectively. Part III provided data on the different business models for plaintiffs' lawyers who

participate in securities class actions to help lead plaintiffs and judges understand the broader ecosystem of lawyering in this area. Part IV presented data identifying problems with the way in which lead plaintiffs and judges currently select and compensate these lawyers. In this Part, we build on our empirical analysis to discuss specific ways that lead plaintiffs and judges can collect and use firm-specific data in individual cases. These suggestions would allow lead plaintiffs and judges to directly compare law firms and better calibrate compensation to law firm performance in these cases.

A.   Selection of Lead Counsel

In choosing among law firms vying for the lead counsel role, prospective lead plaintiffs and judges should require reliable data about past performance from competing firms. They should also require law firms to disclose the other law firms that will work on the case and their roles. This section uses the data in Parts III and IV as a foundation to provide specific questions that lead plaintiffs can use in selecting counsel and that judges can use in reviewing lead plaintiffs' choices. In crafting these questions, we recognize that lead plaintiffs and judges are not experts in this area of the law and have limited time to devote to this process. Our goal therefore is to offer a standard set of questions that should produce short responses from the law firms in a form allowing straightforward comparisons.

1. Questions for Lead Plaintiffs

What are best practices for a lead plaintiff interested in selecting counsel that will efficiently serve the best interests of the class? As Part IV discussed, assessing law firm performance involves understanding a number of metrics regarding firm performance, including a firm's mean and median settlement amount, settlement range, and settlement rate. The process is made more challenging by the information asymmetry between the prospective lead plaintiff and the law firm, as most investors do not have enough experience in securities class actions to know what information to request in the selection process.

To improve this process, we offer a set of questions that any shareholder interested in serving as lead plaintiff in a securities class action can use in selecting their law firm. The questions can specify the preferred time range for the relevant figures. We suggest 8-10 years, as it recognizes that securities class actions can last multiple years and captures a firm's track record over a representative period.

Past Performance

- o In how many securities class actions has your firm been lead or co-lead counsel?

- o What percentage of those cases ended in a settlement or judgment for the plaintiff class?

- o Please provide the mean settlement amount, as well as 25/50/75 percentiles for settlement amounts.

- o For the settled cases, what percentage involved:

  - o SEC investigations?

  - o Other government investigations?

  - o Termination or resignation of a C-suite executive?[198]

- o What percentage were settled prior to the resolution of a motion to dismiss? Class certification? Summary judgment?

- o Please provide the names of lawyers who will be assigned to the case and their experience, including average settlement rates and amounts. Have any of these lawyers taken a securities class action to trial? If so, what was the outcome?

- o What is your proposed strategy for prosecuting this case? What do you see as the case's strengths and weaknesses?[199]

- o What do you think is the likely recovery in this case?

- o What is your cost estimate for the litigation and how do you intend to finance it? How many hours do you estimate will be required to litigate this case through the motion to dismiss?

- o Has your firm or any predecessor firm been sanctioned by a court at any time? Please provide a copy of any order sanctioning the firm.

Fees

- o Please provide 25/50/75 percentiles for fees as a percentage of settlement funds over the past ten years, and the same for multipliers.

- o Please provide a fee schedule, specifying percentages for different settlement amounts and different stages of the litigation.

---

[198] Corporations often allow top executives to resign, rather than being fired, in the wake of misconduct.

[199] We understand that firms may be reluctant to invest the time to conduct a detailed review of the case before they know if they will be selected as lead counsel, as they will not be compensated for their time if they are not selected for this role. Indeed, it is common for law firms to file a bare-boned initial complaint and then file a more detailed amended complaint if and when they are selected as lead counsel. Our approach does require firms to invest more time upfront to determine whether the case has merit, which we believe is consistent with the PSLRA's underlying goals. *See* H.R. Conf. Rep. No. 104–369, p. 31 (1995) (discussing the need for legislation to combat the "routine filing of lawsuits ... with only faint hope that the discovery process might lead eventually to some plausible cause of action").

  o Do you intend to use contract attorneys in this case? If so, how much do you pay them per hour and what is their imputed billing rate that will be used in calculating the lodestar?[200]

Other Law Firm Involvement

  o What other law firms do you anticipate will work on this case?

  o What is their anticipated role?

  o What arrangements have been made to compensate those firms?

The goal of these questions is to understand the prospective lead counsel's prior track record and its litigation strategy for the case at hand. Asking the right questions is no guarantee that the lead plaintiff will make the best choice of law firm, but it is a start.

In addition, these questions will encourage lead plaintiffs to focus on reaching an appropriate ex ante agreement on fees. Currently, some RFPs ask for fee estimates, while others do not. Lead plaintiffs should systematically ask lead counsel applicants to explain up front what type of fee award they will request, including whether the requested award will vary depending on the amount of the settlement or the stage of litigation. Moreover, the suggested questions above include asking the lead counsel applicants for their best estimate of the potential recovery in the case. Getting multiple evaluations of potential recovery from competing law firms—experts in valuing these claims—will help lead plaintiffs negotiate an ex ante fee agreement that will incentivize lead counsel to maximize recovery for the class. It makes sense from the class's perspective to reward law firms for good performance, but creating a structure to do that is impossible without a baseline prediction of recovery likelihood and expected amount. That prediction is not an easy one to make, but the lawyers who specialize in these suits are best equipped to make it.

Some of the information provided in response to this set of questions would need to be kept confidential as attorney-client communication. Prospective lead plaintiffs, however, could still provide courts with the form of the questionnaire that the lead plaintiff used in choosing lead counsel, even if the responses themselves are not filed with the court. Courts should view the rigor of the questions posed to prospective counsel as one marker of the seriousness a prospective lead plaintiff brings to representing the class.

---

[200] In our review of fee applications, we found that firms often recorded a very high hourly rate for contract attorneys, and we therefore recommend that courts compare the lodestar rate with the rate paid to these attorneys to monitor any mark-up by the firms.

2. Questions for Judges

Under the PSLRA, judges play a more limited role in the appointment of the lead counsel. The PSLRA states that "the most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class."[201] Thus, the judge's role is limited to "approval" of the lead plaintiff's choice, which suggests that courts should not take over the power to choose, instead holding something close to a constrained option to veto the lead plaintiff's choice.[202] In exercising this limited power, judges can and should ask certain questions related to the lead plaintiff's selection, including:

- o What process did the lead plaintiff use to select this law firm?

- o What information did the lead plaintiffs solicit in this process?

- o For institutional investors, who were the ultimate decision makers for the lead plaintiff? Did they have any financial or other relationship with the law firm, including campaign contributions? Do the decision makers have any reason to believe that campaign contributions will be made to them (or their political affiliates or allies) in the future? Were other inducements used to encourage selection of the law firm?

- o How many law firms did the lead plaintiff consider in this process?

- o Does the selected law firm provide portfolio monitoring or other services for the lead plaintiff?

These questions allow judges to focus on process, with the substantive decision of which firm to pick remaining with the lead plaintiff.

The court's questioning should also surface potential conflicts of interest involving the lead plaintiff and their proposed lead counsel that might impair their ability to represent the class. Campaign contributions are a conspicuous example here,[203] but lead plaintiffs should also disclose whether any officials received any other financial benefits from lead counsel, including travel to conferences sponsored in whole or in part by these firms. By focusing on these conflicts, as well as the lead plaintiff's selection process, judges can better protect the interests of the class.

---

[201] 15 U.S.C.A. § 78u–4(a)(3)(B)(v).

[202] *See, e.g.*, Jill E. Fisch, Aggregation, *Auctions, and Other Developments in the Selection of Lead Counsel Under the PSLRA,* LAW & CONTEMP. PROBS. (2001), 53, 91 ("The statutory text clearly vests the lead plaintiff, not the court, with the authority to select lead counsel.").

[203] *See, e.g.*, Stephen J. Choi, Drew T. Johnson-Skinner and A.C. Pritchard, *The Price of Pay to Play in Securities Class Actions*, 8 J. EMPIRICAL LEGAL STUD. 650 (2011).

B.   Reforming Fee Awards

Part IV(B) presented data demonstrating problems with prevailing practices for awarding fees, including compensating firms for bearing risk in cases that have little or no risk and failing to account for changes in risk as cases progress. Courts also tend to be more generous in awarding fees in cases with more egregious facts and where the defendants have larger market capitalization. Those cases tend to produce larger settlements, but that does not necessarily mean that the plaintiffs' lawyers produced better results, as the recovery may simply reflect the ease of proving fraud and a defendant with a deeper pocket.

1. Additional Disclosures

As with the lead counsel selection process, addressing these problems starts with requiring law firms to disclose additional—and more specific—information. Under current practice, firms disclose their total hours and lodestar, often broken down by attorney. Yet, as Louis Brandeis recognized with his pithy quote that "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman," more fulsome disclosure can help curb the problems reflected in the data.[204] We propose that judges ask firms to disclose four additional pieces of information.

a)   Mean Fee Percentages and Multipliers in Comparable Cases

Under current practice, law firms are not required to provide the court with the typical fee percentage or multiplier in similar cases. Instead, these firms often present a few examples of cases in which courts awarded an unusually high fee percentage or multiplier, typically without disclosing that these cases are outliers.[205] Federal judges typically do not have enough experience with securities class actions to know the norms in different types of cases. Rather than allowing lead counsel to cherry pick the cases on which they rely, judges should require them to disclose the mean fee percentage and multiplier in cases involving settlements of similar sizes, using data from this study or other studies of securities class actions.[206] This data should be included in the brief itself, not buried in voluminous appendices.

---

[204] Louis D. Brandeis, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

[205] *See supra* note 71 and accompanying text.

[206] For example, NERA Economic Consulting publishes regular reports that include data on trends in securities class action litigation, including the median attorneys' fees as a percentage of total settlement value. *See, e.g.*, Stefan Boettrich & Svetlana Starykh, NERA Economic Consulting, Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review, at 42. Law firms often attach this study as an exhibit to their fee application, but they

The court would have the authority to choose a different percentage and/or multiplier when appropriate, and it should invite lead counsel to explain how the case differs from more typical cases. For example, lead counsel could explain if the case involved greater risk or more complicated legal theories, and the court could adjust the multiplier accordingly. In a smaller case, lead counsel could also argue that the mean multipliers are too low, as our study documents. Starting with a market baseline, however, will help ensure that judges treat like cases alike.

b) Detailed Billing Records

Judges should require all law firms representing the class to submit detailed billing records with their fee applications. Such submissions are common in many other types of class action litigation,[207] but they are not the norm in securities class actions. The provision of detailed billing records would have a salutary effect on the lodestar numbers that attorneys include in their fee applications. We are realists, and we concede that many—perhaps most—judges are unlikely to scrutinize these records closely. Yet even a chance that a judge will review the records may inject greater discipline into the fee process. If the billing records raised questions, the court could appoint a special master to investigate more thoroughly.

A court that wanted to impose additional discipline on the process could go further. For example, the court could require regular submission of these billing records for in camera review by a magistrate judge or special master while the case is pending.[208] Typically, firms do not submit their time records until they file their fee application at the end of the case. At that point, it is difficult for the court to assess the reasonableness of hours invested in the case months or even years earlier. If the law firms had to submit time records and lodestars at important milestones in the litigation, such as after the motion to dismiss and class certification, a magistrate judge or special master could monitor these amounts and ask questions in a more timely manner.

---

are not required (and typically do not) to include this market data in their fee application brief. Busy judges do not have the time to hunt through voluminous appendices for this data; they should instead require plaintiffs' attorneys to include it prominently in their application.

[207] *See, e.g.*, Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P., 888 F.3d 455, 464 (10th Cir. 2017) (holding that "attorneys seeking fees must present 'detailed time records' and 'evidence as to the reasonable value for the services performed'").

[208] A magistrate judge or special master should review these records, rather than the judge presiding over the case, to avoid incentivizing law firms to skew their time in ways that they hope will influence the judge's review of the merits of the case.

c) Fees Broken Down by Litigation Stage

The evidence presented in Part IV(B) suggests the risk of non-recovery drops sharply once the plaintiff survives the motion to dismiss. Time spent investigating the fraud and drafting the complaint therefore warrants a higher multiplier than time spent reviewing documents produced by the defendant in discovery. Both tasks may be important in achieving recovery for the class, but the early efforts are riskier. Given that the multiplier is supposed to compensate for the risk of contingency fee litigation, courts should request that counsel break down their hours by stage of litigation. The court could then tailor the multiplier for these different stages.

Providing more generous multipliers for time spent at the front end would encourage lawyers to bring more challenging cases that face a harder time getting past a motion to dismiss. These cases may have value for deterrence purposes, but they pose substantially greater risks for lawyers.

d) Payments to Other Lawyers

Finally, judges should request information about the proposed distribution of any fee award. Under current practice, lawyers typically include their firms' respective hours and lodestars in their fee applications, but they are under no obligation to divide the fee award based on work performed for the class. As a result, a lead counsel firm that has agreed to give a substantial percentage of the fee to an additional counsel firm that helped it locate a lead plaintiff client does not have to disclose this payment to the court. Yet these payments ultimately come out of the settlement, reducing dollar-for-dollar the amount going to the class, so the class has an interest in knowing how their money is being spent. This information will allow courts to determine whether the efforts of individual firms justify their share of the fee.

2. Incorporating New Data into Fee Awards

Courts should use these additional disclosures to be more deliberate in setting fee awards. First, in setting a fee percentage and multiplier, courts should account for the factors that correlate with settlement incidence, rewarding only performance that surpasses the expected recovery. It is tempting to reward a law firm handsomely for obtaining a large settlement in a case involving egregious fraud. Yet packaging a winning complaint in a case with an SEC investigation or the termination of a C-suite officer by the board does not require as much legal acumen as a case without these pre-filing indicia of fraud. Low-risk cases deserve a more modest multiplier, both for hours invested prior to the resolution of

the motion to dismiss, and even more so after that resolution, when the risk of dismissal drops appreciably. On the flip side, if the lawyers themselves uncovered key facts or developed an innovative legal theory, they should be rewarded with higher fees.

Second, courts should resist the urge to award higher fee percentages and multipliers in cases involving larger corporations. These cases already lead to larger settlements given how damages are calculated in securities class actions, so adding a larger multiplier is effectively double counting. Instead, judges should consider whether the fee award properly incentivizes law firms in the smaller cases, a point raised in empirical studies of class action fees in other contexts as well.[209]

These suggested reforms would help judges do a better job in setting fees, but they would also encourage best practices among lead plaintiffs in negotiating fee arrangements with law firms. If lead plaintiffs enter into fee agreements that provide more generous fees for higher risk work and results that surpass the baseline for expected recovery, courts would be justified in giving substantial weight to those agreements when making fee awards.[210] If lead plaintiffs do not do that work at the front end, it falls on the court to do so when awarding fees.

CONCLUSION

This study brings empirical light to the black box of securities class action lawyering. The data and analysis provided here can help prospective lead plaintiffs become more informed shoppers for legal services in securities class actions. Judges, too, can nudge lead plaintiffs toward best practices in negotiating fee agreements, while also uncovering conflicts of interest in the selection of lead counsel. Judges also have room to improve in making fee awards. A more analytical approach to fee awards could enhance lawyers' incentives to vigorously pursue meritorious actions.

Our study explores the business behind this area of practice, but it is hardly the last word. Judges and lead plaintiffs should also have the ability to evaluate law firms by comparing the actual outcome of their cases with the expected outcome given the particular characteristics of their cases. In forthcoming work, we will build on the empirical lessons here to create a robust analytical model that will allow judges and lead plaintiffs to assess

---

[209] *See* Fitzpatrick, *supra* note 69 (presenting data demonstrating that, "in small-stakes class actions, lawyers are undercompensated").

[210] *See, e.g.,* Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L. REV. 1151, 1152 (2021) (arguing that, in class actions generally, "judges should set fees in the same way rational class members would have set them at the outset of the case if they had had the opportunity to do so").

the performance of firms in specific cases against a baseline.[211] Firms that regularly achieve outcomes that are better than the expected outcomes should be rewarded with lead counsel positions and higher fee awards.

This study also provides lessons for class action litigation more generally. Although our study focuses on securities class actions, the U.S. legal system uses class actions to enforce a variety of laws that protect the public, from labor and employment legislation to consumer fraud and antitrust laws.[212] In all these areas, class members rely on lawyers to vindicate their rights. Our study provides a roadmap for scholars in other areas to evaluate the law firms that file these lawsuits and ensure that these firms are properly compensated. As this Article demonstrates, a legal system that relies on class actions to further important social policies must also understand the incentives and business models of the law firms that do this work.

---

[211] *See* Choi, Erickson & Pritchard, *Paying for Performance? Attorneys' Fees in Securities Class Actions* (working paper).

[212] *See* Carlton Fields, 2022 Class Action Survey, at https://classactionsurvey.com/ (discussing various types of class action litigation).