

# LOSER-PAYS—OR WHOSE “FAULT” IS IT ANYWAY: A RESPONSE TO HENSLER-ROWE’S “BEYOND ‘IT JUST AIN’T WORTH IT’”

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## I

### INTRODUCTION

While acknowledging the benefits of class actions, Professors Hensler and Rowe propose a fundamental change that would sound their death knell.<sup>1</sup> The authors urge consideration of a loser-pays provision modified from the “English” rule in two fundamental ways. First, a loser-pays rule would apply only to certified class actions.<sup>2</sup> Second, while defendants would be personally liable for any attorney fees and costs if they lost the litigation, only plaintiffs’ *counsel* would be liable if plaintiffs lost.<sup>3</sup> In effect, the “Hensler-Rowe proposal” would eliminate consideration of whether a claim was brought in good faith, imposing instead a “no-fault” rule on unsuccessful counsel.

The Hensler-Rowe proposal is unwise for many reasons. First, it is premised on an assumption that “abusive” or “nuisance” class actions are widespread. The authors, however, cite no empirical support for this assumption. They rely only on anecdotal evidence provided mostly by corporate counsel.<sup>4</sup> In

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1. See Deborah Hensler & Thomas Rowe, *Beyond “It Just Ain’t Worth It,”* 64 LAW & CONTEMP. PROBS. 137, 140 (Spring/Summer 2001).

2. See *id.* at 134.

3. See *id.*

4. See *Legal Reform Issues in the Contract with America: Hearing on H.R. 10 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. (1995) (statement of Herbert M. Kritzer, Professor of Political Science and Law, University of Wisconsin):

I regularly hear comments, such as that of Professor Rowe, “most lawyers with experience in the defense of civil cases—and . . . and that includes myself—would likely insist that there is some noticeable amount of nuisance litigation.” No doubt nuisance litigation does occur, and when it does occur defense lawyers take note of it; but a “noticeable” amount could be ½%, 1%, 5%, or 10% of cases—it doesn’t take much to be noticed, particularly for something that is in fact quite unusual. Claims about substantial numbers of unmeritorious lawsuits lack solid foundations. For example, last week’s *U.S. News & World Report* made reference to the Harvard Medical Practice Study in New York, suggesting that most of the malpractice cases involving patients in that study were without foundation; in fact, the authors of the original

addition, the Hensler-Rowe proposal incorrectly projects that a loser-pays rule would only modestly increase costs for prosecution of any class action.<sup>5</sup> The authors ignore the substantial costs that counsel for both sides already must incur to prepare any complex case for trial and the adverse impact that doubling those costs would have on counsel's decision to pursue a claim.

The authors also presume a high degree of prescience on the part of plaintiffs' counsel, particularly regarding uncertain areas of the law. Federal circuit courts often disagree on applicable legal standards, and along with the United States Supreme Court often issue split decisions, yet the Hensler-Rowe proposal would automatically penalize counsel even if several members of a court may have agreed with their position. Similarly, the Hensler-Rowe proposal ignores the uncertain nature of litigation, where jury verdicts for plaintiffs may be reversed on motions for judgment notwithstanding the verdict and appeals. The automatic "costs-follow-the-event-rule"<sup>6</sup> proposed by Professors Hensler and Rowe fails to account for unsuccessful cases with significant merit. In fact, if the Hensler-Rowe proposal were adopted, a substantial number of potentially meritorious claims would not be pursued at all. Moreover, attorneys who file class actions would face enormous pressure to settle prematurely rather than risk automatic sanctions, effectively placing counsel in conflict with the class they represent.

Hensler and Rowe discuss at length alternative solutions to the perceived problem of abusive class action suits.<sup>7</sup> The alternatives, which involve greater judicial scrutiny of settlements and fee awards, are well-considered and warrant further consideration. Another potential solution not addressed by Hensler and Rowe is mandatory consideration of Rule 11 sanctions at the conclusion of any class action, a remedy Congress imposed on securities fraud cases in the Private Securities Litigation Reform Act of 1995 ("PSLRA").<sup>8</sup> As discussed below, Congress, when considering the PSLRA, wrestled with the same issues considered by the authors, and reached a far less draconian resolution. Rather than radically change the landscape of class action litigation, as suggested by Hensler and Rowe, the courts should instead apply heightened standards of scrutiny for settlements and fee awards.<sup>9</sup>

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study stated that "our lack of access to litigation files prevented any determination whether malpractice claims in the sample are non-meritorious." Overall, we lack any solid empirical base for making statements about the proportion of civil cases or damage claims that are frivolous. In fact, I know of no evidence on what proportion of cases filed are arguably frivolous; the frivolous case debate is sustained primarily through anecdotes.

*Id.* (footnotes omitted); see also Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998).

5. See Hensler & Rowe, *supra* note 1, at 137.

6. See *id.* at 147.

7. See *id.* at 131.

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

9. This article does not address the question whether a "loser-pays" rule would in fact deter frivolous litigation. For discussions of that topic, see A. Mitchell Polinsky & Daniel L. Rubinfeld, *Does the English Rule Discourage Low-Probability-of-Prevailing Plaintiffs*, 27 J. LEGAL STUD. 141 (1998); Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Con-*

## II

## DISCOURAGING MERITORIOUS CASES

The fundamental problem with a loser-pays proposal is that it would chill counsel from pursuing cases involving potentially legitimate claims where success is uncertain. For example, the facts of a case may satisfy the legal standard of one jurisdiction, though not a second jurisdiction; in a third jurisdiction, the standard may be undecided. The Hensler-Rowe proposal also presumes that counsel can gauge accurately the strength or weakness of a claim at an early stage of the litigation without access to all of the discoverable facts. Though that may be the case in traditional commercial litigation where both sides have equal access to information at the outset, it is rarely true in traditional securities, antitrust, or complex consumer class actions. Indeed, Hensler and Rowe themselves cite empirical evidence regarding the difficulty of early assessment of a case's merit:

After reviewing information about the claims underlying ten recent damage class actions, RAND's analysts wrote: "We felt like members of the audience at a production of the Japanese drama 'Rashomon.' Viewed from one perspective, the claims appear meritorious and the behavior of the defendants blameworthy, but viewed from another, the claims appear trivial or even trumped up, and the defendant's behavior seems proper."<sup>10</sup>

Given the numerous variables that counsel must weigh, and the uncertainty of the outcome, the prospect of facing automatic sanctions for merely being incorrect would undoubtedly deter a great number of claims that warrant pursuit.

Plaintiffs' counsel would be reluctant to bring meritorious lawsuits because of the substantial increased exposure to costs. The authors casually suggest that "the additional exposure" faced by plaintiffs' counsel "should have a moderate effect" on plaintiffs' counsel's risk.<sup>11</sup> Not only is this bold statement unsupported, it is contrary to fact. Plaintiffs' counsel usually incur substantial costs not only in investigating claims prior to commencement, but also in litigating them to conclusion.<sup>12</sup> These costs exponentially increase as both sides retain experts, and frequently exceed hundreds of thousands of dollars. The additional value of time expended by plaintiffs' counsel often exceeds one million dollars in any case that is litigated vigorously.

By way of example, in a recent case that was litigated through summary judgment, *In re Valence Technology, Inc.*,<sup>13</sup> plaintiffs' counsel alone expended \$11,007,989 in time, and \$3,680,013 in out-of-pocket costs.<sup>14</sup> The court initially granted defendants' motion for summary judgment on the ground that the suit

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*fronts Theory*, 6 J. L. ECON. & ORG. 2, 345-80 (1990); John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access To Justice*, 42 AM. U. L. REV. 1567 (1993).

10. Hensler & Rowe, *supra* note 1, at 144.

11. *Id.* at 150.

12. See *infra* notes 13-17 and accompanying text.

13. 987 F. Supp. 796 (N.D. Cal. 1997).

14. See Telephone Interview with Keith F. Park, Partner, Milberg Weiss Bershad Hynes & Lerach, LLP (Sept. 2000).

had been time-barred due to publication of an article in *Forbes* prior to commencement of the case.<sup>15</sup> This decision was reversed on appeal,<sup>16</sup> and the case was ultimately settled. Under the Hensler-Rowe proposal, had the district court's decision been sustained, the plaintiffs would have faced the prospect of not only losing their multi-million dollar investment in the case, but also paying an equivalent amount of out-of-pocket expenses to the defendant (or its insurer). This is hardly a "moderate" increase in the risks faced by plaintiffs' counsel and would undoubtedly result in meritorious cases not being brought.<sup>17</sup>

The serendipitous nature of complex litigation would only compound the chilling effect of an automatic loser-pays provision. Many cases have been won before a jury only to be lost after trial by a district court's entry of judgment notwithstanding the verdict or by appellate court reversal. The Hensler-Rowe proposal fails to account for this possibility. As one court noted in the context of complex litigation, "no matter how confident one may be of the outcome of litigation, such confidence is often misplaced."<sup>18</sup>

A prime example of a meritorious case that either would likely not have been brought or would have been prematurely settled under the Hensler-Rowe proposal is *In re Prudential Insurance Company of America*.<sup>19</sup> That case arose out of widespread abusive sales practices by Prudential's agents, including the sale of whole-life insurance policies with the representation that a customer's need to pay premiums out-of-pocket would vanish after a limited number of payments.<sup>20</sup> Instead, agents led customers to believe that premiums would be

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15. *See id.*

16. *See Berry v. Valence Technology, Inc.*, 175 F.3d 699, 701 (9th Cir. 1999).

17. *See, for example, In re Sybase, Inc. Sec. Litig.*, 48 F. Supp. 2d 958 (N.D. Cal. 1999), where the parties settled the case while a summary judgment motion was *sub judice*. After the court was told the parties had settled, the court granted summary judgment. Plaintiffs' counsel's lodestar in that case was \$6,686,522, and expenses were \$2,395,861. Telephone Interview with Keith Park, *supra* note 14. An appeal is pending to the Ninth Circuit, Civ. No. 99-16120.

18. *State of West Virginia v. Charles Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971). The Court in *Charles Pfizer & Co.* cited instances where settlements were rejected by the Court, followed by trials which resulted in smaller recoveries or no recovery whatsoever.

In *Piccard v. Sperry Corp.*, a proposed settlement was disapproved. The action was then tried on the merits, resulting in the judgment for defendants. In *Upson v. Otis*, approval of a settlement was reversed, the Court saying: "on the facts presented to the district judge, the liability of the individual defendants was indubitable and the amount of recovery beyond doubt greater than that offered in the settlement. Accordingly it was an abuse of discretion to approve the settlement." The action was then tried and plaintiffs obtained a judgment, twice considered by the Court of Appeals. We are told, however, that "the ultimate recovery . . . turned out to be substantially less than the amount of the rejected compromise."

*Id.* at 744 (citations omitted); *see also Robbins v. Koger Properties, Inc.*, 116 F.3d 1441 (11th Cir. 1997) (court reversed \$81.3 million jury verdict for investors upon its determination that the loss causation element had not been met); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation); *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir. 1990) (en banc) (reversing plaintiffs' verdict for securities fraud and ordering entry of a judgment for defendants); *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988) (reversing plaintiffs' jury verdict for securities fraud).

19. 962 F. Supp. 450 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3d Cir. 1998).

20. *See id.* at 469.

paid out of the accumulated cash value in the policies.<sup>21</sup> Customers were allegedly deceived because they were not informed that the need to pay such premiums would “vanish” only if interest rates remained at the high levels prevailing at the time.

After commencement of the case, but prior to any discovery, Prudential approached plaintiffs’ counsel regarding a potential settlement.<sup>22</sup> Plaintiffs’ counsel refused to consider the settlement proposal.<sup>23</sup> As subsequently characterized by a court-appointed examiner, “[p]laintiffs’ counsel acted in this regard with singular devotion to the interests of the class, putting aside their own economic interest in a potential early settlement without the expenditure of substantial assets.”<sup>24</sup> After plaintiffs’ counsel rejected the early settlement offer, defendants moved to dismiss the complaint. The court granted the motion with regard to several claims and questioned the potential viability of others:

The Court has found much of the Complaint to be deficient, and will dismiss several of plaintiffs’ claims without prejudice. On the other hand, the standard for dismissal under Rule 12(b)(6) is a high one, and the Court has allowed several claims to go forward, despite considerable doubt as to their ultimate merits. In sum, this opinion will likely not be the final word in framing the issues ultimately to be resolved in this case. Plaintiffs may successfully replead some of their claims,<sup>25</sup> and Prudential may prevail on some of its arguments at the summary judgment stage.<sup>25</sup>

Subsequent to that decision, however, a multi-state Task Force of Insurance Regulators, which had conducted an extensive investigation that included widespread discovery of defendants’ documents, concluded that “Prudential policyholders had been misled to purchase life insurance and that Prudential’s internal efforts to prevent these abuses were inadequate.”<sup>26</sup> With the benefit of the additional information developed through the Task Force investigation, the parties ultimately entered into a settlement that included a “Financial Guarantee,” whereby Prudential agreed to pay benefits costing the company no less than \$780 million.<sup>27</sup>

A multitude of other consumer cases have been successfully concluded, though under the Hensler-Rowe proposal they likely would never have been brought or would have settled prematurely. Notable cases include the recent billion-dollar jury verdicts for claims brought on behalf of Florida smokers<sup>28</sup> and on behalf of State Farm insurance customers whose cars were repaired with after-market parts instead of parts made by the original manufacturer.<sup>29</sup> When each of these cases was litigated, the legal theories underlying them were un-

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21. *See id.* at 470.

22. *See id.* at 482-83.

23. *See id.*

24. *Id.* at 482 (quoting the report and recommendation of Fee Examiner Stephen M. Greenberg).

25. *Id.* at 483-84 (quoting *In re Prudential Ins. Co. of Am.*, 975 F. Supp. 584, 591 (D.N.J. 1996)).

26. *Id.* at 484.

27. *See id.* at 491.

28. *See Engle v. R.J. Reynolds*, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996); Barry Meier, *Industry Crosses Troubling Line*, N.Y. TIMES, July 15, 2000, at A11.

29. *See Snider v. State Farm Mut. Auto. Ins. Co.*, No. 97-L-114 (Ill. Cir. Ct. Oct. 4, 2000).

tested. The Hensler-Rowe proposal may well have prevented plaintiffs' counsel from filing these claims, thereby undermining the well-recognized social benefits of class action litigation. The authors themselves acknowledge that class action litigation provides "compensation for modest but non-trivial losses" and deters "illegal behavior."<sup>30</sup> Indeed, for the very reasons discussed above, a younger Professor Rowe argued *against* an automatic loser-pays rule in a 1982 article:

One of the problems of a system of general fee shifting, and one that can make judicial discretion to deny [automatic] fee [shifting] awards appear especially attractive, is that applying the rule can seem harsh and unfair in close cases. And difficult cases, with outcomes hard to predict, seem more likely to end in an expensive trial than in a settlement. Close cases may thus cast the loser assessed for fees in the role of one unfairly and severely punished for proceeding entirely reasonably. Though he may have lost, he acted not only within his rights but with good foundation in contesting the case.<sup>31</sup>

### III

#### ADDITIONAL CONSIDERATIONS

##### A. Undue Pressure to Settle Prematurely

Another major risk of the Hensler-Rowe proposal would be coercing plaintiffs' counsel into accepting lower settlements, because continuing the litigation of claims with uncertain prospects could cause counsel's costs to increase if the claim is unsuccessful.<sup>32</sup> Moreover, allocating the risk of loss to plaintiffs' counsel, rather than to the plaintiffs themselves, creates a conflict of interest between attorney and client. The client bears no risk in proceeding with the lawsuit because counsel is bearing both its costs and potentially those of its adversary. Thus, the prospect of having to pay defendants' costs would have no bearing on the clients' decision to settle. On the other hand, plaintiffs' counsel may view a lower settlement offer as reasonable given the compounded consequences that a loss would present. This would only drive a wedge between attorney and clients, and potentially encourage "lawyer-driven" settlements.<sup>33</sup>

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30. Hensler & Rowe, *supra* note 1, at 137.

31. Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 670. Rowe also noted that

imposition of an automatic loser-pays provision would also likely result in fewer plaintiff firms handling class actions because of the greater risk of higher costs. The resultant concentration of the class action practice in a few, well-capitalized firms would likely diminish the willingness of those remaining firms to take on smaller, potentially meritorious cases, since the firms could be more selective in allocation of their resources and risks.

*Id.* at 670.

32. See, e.g., *In re Prudential*, 962 F. Supp. 450, 495 (D.N.J. 1997).

33. Professor John Coffee made this observation during the presentation of the Hensler-Rowe paper at the Complex Litigation conference, co-sponsored by Duke University and the Institute for Law and Economic Policy on April 15, 2000.

## B. Automatic Sanctions Would Be Particularly Unfair Where the Court Previously Found Sufficient Merit in Permitting the Case to Proceed

Imposition of automatic sanctions would be particularly unfair and arbitrary in cases where the courts have denied motions for summary judgment. In such instances, the court has agreed with counsel's assessment that the claims have merit. Automatic sanctions would also be improper in securities fraud class actions where courts have denied motions to dismiss. The PSLRA clarified the pleading requirements for fraud claims, requiring that plaintiffs allege particularized evidence giving rise to a "strong inference" that defendants acted "with the required state of mind."<sup>34</sup> This standard was adopted to curb the purported "abuse of the securities laws by private litigants."<sup>35</sup> No justification is offered by Professors Hensler and Rowe for adding additional measures to deter further the filing of such securities fraud actions.<sup>36</sup> It makes little sense to impose costs

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34. 15 U.S.C. § 78u-4(b)(2); see H.R. REP. NO. 104-369, at 41 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 740 [hereinafter Conference Report]. Every United States Court of Appeals (other than the Ninth Circuit) that has considered the issue has held that the PSLRA conformed the scienter pleading requirement to the reckless or conscious behavior standard previously imposed by the Second Circuit. See *Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529 (2d Cir. 1999); *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525 (3d Cir. 1999); *Williams v. WMX Techs.*, 112 F.3d 175 (5th Cir. 1997); see also *Greebel v. FTP Software, Inc.*, 194 F.3d 185 (1st Cir. 1999); *In re Comshare Inc. Secs. Litig.*, 183 F.3d 54, 551 (6th Cir. 1999); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1284-85 (11th Cir. 1999) (finding recklessness sufficient, but not motive alone); *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 620-24 (4th Cir. 1999) ("The PSLRA did not change the standard of proof a plaintiff must meet or the kind of evidence a plaintiff must adduce to demonstrate scienter at trial." *Id.* at 620.) *But cf. In re Silicon Graphics Sec. Litig.*, 183 F.3d 970 (9th Cir. 1999).

35. Conference Report, *supra* note 34 at 41, *reprinted in* 1995 U.S.C.C.A.N. at 740.

36. The heightened pleadings standards of the PSLRA have served as an effective filter, resulting in the early dismissal of many securities fraud actions. See, e.g., *Yourish v. California Amplifier*, 191 F.3d 983 (9th Cir. 1999); *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970 (9th Cir. 1999); *In re PetSmart, Inc. Sec. Litig.*, 61 F. Supp. 2d 982 (D. Ariz. 1999); *In re CBT Group PLC Sec. Litig.*, [1999-2000] Fed. Sec. L. Rep. (CCH) ¶ 90,604 (N.D. Cal. 1999); *Reiger v. Altris Software, Inc.*, [1999 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 90,491 (S.D. Cal. 1999); *Chan v. Orthologic Corp.*, No. CIV-96-1514-PHX-RCB (D. Ariz. Feb. 2, 1998); *Molinari v. Symantec Corp.*, No. C-97-20021-JW, 1998 U.S. Dist. LEXIS 21668 (N.D. Cal. Mar. 17, 1998); *Head v. Netmanage, Inc.*, No. C. 97-4385 CRB, 1998 U.S. Dist. LEXIS 22733 (N.D. Cal. Feb. 23, 1998); *In re Fritz Cos. Sec. Litig.*, No. C 96-2712 MHP (N.D. Cal. Mar. 5, 1998); *Edwards v. Casino Data Systems, Inc.*, No. CV-S-96-1191-LDG (LRL) (D. Nev. Mar. 5, 1998); *Allison v. Brooktree Corp.*, 999 F. Supp. 1342 (S.D. Cal. 1998); *Wenger v. Lumisys, Inc.*, 2 F. Supp. 2d 1231 (N.D. Cal. 1998); *Howard Gunty Profit Sharing v. Quantum Corp.*, No. C 96 20711 SW (N.D. Cal. Apr. 6, 1998); *Ronconi v. Larkin*, [1998 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 90,212 (N.D. Cal. 1998); *In re YES! Entertainment Corp. Sec. Litig.*, No. C97-01388 CRB, 1998 U.S. Dist. LEXIS 22106 (N.D. Cal. May 14, 1998); *Brandy v. Anderson*, No. CV 97-2154 (Shx), 1998 U.S. Dist. LEXIS 20774 (C.D. Cal. May 27, 1998); *In re Read-Rite Corp. Sec. Litig.*, No. C-98-20434 (N.D. Cal. Aug. 12, 1998); *Goldberg v. Storm Technology, Inc.*, Nos. C-97-21101-IF, C-98-20186-IF (N.D. Cal. Nov. 3, 1998); *Allison v. Booktree Corp.*, No. 97-CV-0852 TW (POR), 1998 U.S. Dist. LEXIS 21859 (S.D. Cal. Nov. 25, 1998); *Plevy v. Haggerty*, 38 F. Supp. 2d 816 (C.D. Cal. 1998); *David T. O'Neal Trust v. Vanstar Corp.*, No. C 98-0216 MJJ (N.D. Cal. Dec. 22, 1998); *Head v. Netmanage, Inc.*, [1999 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 90,412 (N.D. Cal. 1998); *Kainos v. Beacon Diagnostics, Inc.*, [1999 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 90,413 (N.D. Cal. 1998); *Hockey v. Medhekar*, [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,465 (N.D. Cal. 1997); *In re Silicon Graphics Sec. Litig.*, 970 F. Supp. 746 (N.D. Cal. 1997), *aff'd*, 183 F.3d 970 (9th Cir. 1999); *Kane v. Madge Networks N.V.*, No. C 96-20652 RMW (PVT) (N.D. Cal. June 3, 1997); *In re Oak Tech. Sec. Litig.*, No. C-96-20552-SW, 1997 U.S. Dist. LEXIS 18503 (N.D. Cal. Aug. 1, 1997); *Genna v. Digital Link Corp.*, 25 F. Supp. 2d 1032 (N.D. Cal. 1997); *Howard Gunty Profit Sharing v. Quantum Corp.*, No. 96-20711-SW, 1997 U.S. Dist. LEXIS 23532 (N.D. Cal. Aug. 14, 1997); *In re Stratosphere Corp. Sec. Litig.*, [1997

on counsel that successfully persuaded *the court* at the outset of the litigation that the claim warranted litigation, particularly when counsel also persuaded the court that class action treatment was appropriate. Just as courts have often held that defendants should not be penalized for conduct that, with the benefit of hindsight, appeared ill-considered,<sup>37</sup> so too would it be unfair automatically to impose sanctions upon plaintiffs' counsel when, again with hindsight, the claims turned out to lack sufficient merit to justify recovery.

### C. Additional Anomalies With the "Lead Plaintiff" Provisions of PSLRA

The Hensler-Rowe proposal would shield plaintiffs, not their counsel, from the impact of loser-pays because, the authors assume, plaintiffs in most class actions lack the resources to pay for any court-awarded sanctions. Therefore, the imposition of fees and costs on unsuccessful plaintiffs would be meaningless because they would not be collectible.

This model of the impecunious plaintiff, however, is ill-suited to post-1995 federal securities class actions. In adopting the PSLRA, Congress expressed its intention to discourage lawyer-driven litigation by encouraging greater participation of institutional investors as lead plaintiffs.<sup>38</sup> Such institutional investors, particularly the large public pension funds that have come forward in *In re Centandant Corp. Litigation*,<sup>39</sup> *In re McKesson HBOC, Inc. Securities Litigation*,<sup>40</sup> and other high profile cases, are vastly better funded than their counsel and can afford to pay such penalties.<sup>41</sup> Yet the Hensler-Rowe proposal would exclude these institutional investors from any liability for pursuing securities fraud claims that were ultimately unsuccessful. Shielding well-financed institutional investors from the impact of a loser-pays provision would effectively undermine the efforts of the PSLRA to ensure that such investors are in fact guiding the litigation. As noted above, the interests of counsel and the client would undoubtedly diverge when defendants make lower settlement proposals.

On the other hand, if institutional investors were exposed to such liability, they would undoubtedly stop participating in such class actions. Trustees of public pension funds have fiduciary duties to their beneficiaries and tend to be very risk-averse. The possibility of paying counsel fees, even for cases with prima facie validity, undoubtedly would deter involvement by such public funds.

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Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,473 (D. Nev. 1997); *Myles v. Midcom Communications, Inc.*, No. C96-614D (W.D. Wash. Nov. 19, 1996).

37. See, e.g., *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111 (2d Cir. 1982).

38. See 15 U.S.C. § 78U-4(a)(3).

39. 182 F.R.D. 144 (D.N.J. 1988).

40. 97 F. Supp. 2d 993 (N.D. Cal. 1999).

41. In both cases, the New York State Pension Fund, with billions in assets, was a lead plaintiff.



#### D. The “In Terrorem Threat” of Class Certification

Another fallacy of the Hensler-Rowe proposal lies in its predicate assumption that class certification poses an in terrorem threat to defendants, pressuring them to enter into settlements of claims that lack merit but are too costly to bring to trial. They cite no examples. Indeed, this sounds reminiscent of the “myths” of litigation that Professor Marc Galanter detailed in his article, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*.<sup>42</sup>

An empirical analysis of class actions conducted by the Federal Judicial Center debunks this myth.<sup>43</sup> In response to the question “did certification coerce settlement of frivolous or near-frivolous claims,”<sup>44</sup> the authors concluded that

[t]he data on timing of settlements therefore did not support any inference of a relationship between certification and settlement. Many cases settled before the court ruled on certification, and a sizable number—a majority in three of the districts [out of the four studied]—settled more than a year after certification.<sup>45</sup>

In addition, there is ample anecdotal evidence demonstrating defendants’ willingness to bring certified class actions to trial. For example, several pharmaceutical companies refused to join the \$400 million settlement of class action antitrust claims arising from discounting practices. Instead, the companies took the case to trial, and won.<sup>46</sup> In *Gaidon v. Guardian Life Insurance Company of America*,<sup>47</sup> defendants in a “vanishing premium” life insurance case even stipulated to a class (to avoid being attacked in different forums) and then moved to dismiss the claims.<sup>48</sup> The lower court dismissed the classwide claims.<sup>49</sup> The strategy was successful until the New York Court of Appeals reversed the dismissal.<sup>50</sup>

42. See Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998).

43. See Thomas E. Willging et al., Symposium: *The Institute of Judicial Administration Research Conference on Class Actions: Class Actions and the Rulemaking Process: An Empirical Analysis of Rule 23 to Address The Rulemaking Process*, 71 N.Y.U. L. REV. 74 (1996).

44. *Id.* at 142.

45. *Id.* at 146.

46. See *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94-C897, MDL 997, 2000 U.S. Dist. LEXIS 1750, at \*1 (N.D. Ill. Feb. 10, 2000). Other instances where defendants have gone to trial with certified securities fraud class actions include *In re Computer Associates*, 75 F. Supp. 2d 68 (E.D.N.Y. 1999); *In re Health Management, Inc.*, No. CV 96-889 (ADS) 184 F.R.D. 40 (S.D.N.Y. 1999); *In re ICN/Viratele*, No. 87 Civ 4296, 1996 U.S. Dist. LEXIS 4407, \*1 (S.D.N.Y. Apr. 4 1996); *Bentley v. Legent Corp.*, 849 F. Supp. 429 (E.D. Va. 1994); *In re Apple Computer*, 672 F. Supp. 1552 (N.D. Cal. 1987), *summary judgment granted*, 690 F. Supp. 872 (N.D. Cal. 1987), *aff'd in part and rev'd in part*, 886 F.2d 1109 (9th Cir. 1989); *In re Biogen*, 179 F.R.D. 25 (Mass. 1997).

47. 94 N.Y.2d 330 (1999).

48. See *id.* at 340.

49. 679 N.Y.S.2d 611 (1998).

50. See 94 N.Y.2d 330 (1999).

### E. Heightened Judicial Scrutiny of Settlements Strikes the Right Balance

Professors Hensler and Rowe, aided by the results of the RAND study, survey a number of other measures that, in large part, involve heightened judicial scrutiny of settlements and fee awards. Such careful consideration of settlements is reflected in the comprehensive opinions issued in connection with the *Prudential* settlement.<sup>51</sup> Such measures generally are welcomed by the plaintiffs' bar and potentially are effective in challenging questionable settlements.<sup>52</sup>

Hensler and Rowe fail to address the alternatives to an automatic loser-pays proposal discussed by Congress when drafting the PSLRA. As the House Conference Report stated, "[t]he Conference Committee recognizes the need to reduce significantly the filing of meritless securities lawsuits without hindering the ability of victims of fraud to pursue legitimate claims. The Conference Committee seeks to solve this problem by strengthening the application of Rule 11."<sup>53</sup> The Report identified many of the same problems that Professors Hensler and Rowe have addressed. As the Report noted, courts often fail to "impose Rule 11 sanctions even where . . . warranted";<sup>54</sup> when imposed, the sanctions were "generally insufficient to make whole the victim of a Rule 11 violation."<sup>55</sup> In response to this perceived problem, Congress adopted provisions that gave "teeth" to Rule 11.<sup>56</sup> The PSLRA requires "the court to include in the record specific findings, at the conclusion of the action, as to whether all parties and all attorneys have complied with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure."<sup>57</sup> The legislation also established the "presumption that the appropriate sanction for filing a complaint that violates Rule 11(b) is an award to the prevailing party of all attorney's fees and costs."<sup>58</sup>

Courts have been applying this heightened Rule 11 provision. Recently, in *Polar International Brokerage Corp. v. Reeve*,<sup>59</sup> the court dismissed claims arising out of defendants' alleged misrepresentations made in connection with a tender offer. The court found that the proxy fraud claim was not only "legally insufficient but appears wholly frivolous,"<sup>60</sup> and gave plaintiffs' counsel fourteen days to show cause why sanctions should not be imposed.<sup>61</sup> Arguably, the facts in *Polar II* were particularly egregious and fit the prototype case that the Hen-

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51. 962 F. Supp. 450 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3rd Cir. 1998).

52. At the same time that the authors applaud and seek to expand such judicial scrutiny, they question its ability ultimately to deter questionable settlements, suggesting that counsel can shop settlements until they find a favorable federal jurisdiction. No examples are cited, however. Moreover, this would appear highly unlikely given the ability of any party to compel transfer to one forum through a motion to the Judicial Panel for Multi-District Litigation.

53. Conference Report, *supra* note 35, at 39, *reprinted in* 1995 U.S.C.C.A.N. 730, 739.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. 108 F. Supp. 2d 225 (S.D.N.Y. 2000) [hereinafter *Polar II*].

60. *Id.* at 251.

61. *See id.*

sler-Rowe proposal seeks to curb. The parties had initially agreed to a proposed settlement involving no monetary relief for the class, but rather disclosure of additional documents that had led plaintiffs' counsel to conclude that the proposed tender offer was not unfair. The settlement also called for payment of fees to plaintiffs' counsel totaling \$200,000.<sup>62</sup> The court rejected this settlement and warned that "if counsel chooses to proceed, it should be mindful of the PSLRA's requirement of a mandatory Rule 11 review at the conclusion of any case."<sup>63</sup> In dismissing the subsequently amended complaint, the court cited the fact that, in papers submitted in support of the previously rejected settlement, plaintiff had acknowledged that "discovery and examination of the documents, methodology and witnesses adduced no evidence that said consideration was unfair or inadequate."<sup>64</sup>

In *Simon DeBartolo Group L.P. v. Richard E. Jacobs Group, Inc.*,<sup>65</sup> the court held that one of the claims asserted by the plaintiff arising out of a dispute for control of a real estate investment trust was frivolous and sanctioned the plaintiff and its attorneys \$100,000.<sup>66</sup> The Second Circuit agreed that the claim was frivolous and sanctionable, but reversed insofar as the award represented the defendant's entire attorneys' fees and costs, because other claims asserted by plaintiff, though unsuccessful, were deemed not frivolous.<sup>67</sup>

The Hensler-Rowe proposal also appears to be predicated on the presumption that most courts will fail to exercise their duty to scrutinize settlements, thereby encouraging plaintiffs' counsel to bring actions that are otherwise of questionable benefit. The experience in *Polar I* and *Polar II* certainly belies that claim, as does the recent decision in *Zawikowski v. Beneficial National Bank*.<sup>68</sup> In that case, the court considered a proposed \$25 million settlement of claims arising out of fees charged for tax refund anticipation loans offered by H&R Block and Beneficial National Bank. The court rejected objections that the settlement consideration was inadequate, citing the significant likelihood that only a portion of the financing fee was improper, and that damages were therefore substantially less than the objectors hoped to prove. At the same time, the court insisted that the settlement be modified, requiring that none of the settlement payment revert to defendants. These case studies demonstrate that, with only a little prodding, courts have blocked or modified inappropriate settlements and have considered loser-pays sanctions on a discretionary basis.

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62. See *Polar Int'l Brokerage Corp. v. Reeve*, 187 F.R.D. 108, 111-12 (S.D.N.Y. 1999) [hereinafter *Polar I*].

63. *Id.* at 120 n.10.

64. *Polar II*, 108 F. Supp. 2d at 234.

65. 985 F. Supp. 427 (S.D.N.Y. 1997).

66. See *id.* at 433.

67. See *Simon DeBartolo Group L.P. v. Richard E. Jacobs Group, Inc.*, 186 F.3d 157, 177-78 (2d Cir. 1999); see also *Inter-Country Resources, Inc. v. Medical Resources Inc.*, 49 F. Supp. 2d 682 (S.D.N.Y. 1999) (sanctions imposed); *Scott v. Steingold*, No. 97-C7871, 1998 U.S. Dist. LEXIS 15810, at \*26-28 (N.D. Ill. Sept. 30, 1998) (sanctions not imposed).

68. No. 98-C2178, 2000 U.S. Dist. LEXIS 11535, at \*1 (N.D. Ill., E.D. July 24, 2000).

#### F. Other Remedial Measures to Deter Abusive Class Actions Are Available

Other tools are currently available to thwart allegedly abusive class actions. The right to appeal any class certification was recently added to the Federal Rules of Civil Procedure.<sup>69</sup> This provision will undoubtedly serve as a check upon any improper certifications of class actions, and many states already permit the appeal of class certification rulings. It is also unlikely that questionable settlements would be proposed if they were subject to greater scrutiny not only by courts, but also by the public. Posting settlements on the Internet would be a cost-efficient means of disseminating notice to the public, thereby drawing more attention to their terms. State Attorneys General could set up websites where such notices could be viewed by citizens, watchdog groups, and the press. The more such settlements are exposed to the light of public scrutiny, the less likely any frivolous settlements will pass muster.<sup>70</sup>

### IV

#### CONCLUSION

In conclusion, adoption of a loser-pays provision in class actions will deter filing of meritorious claims and diminish the ability of the legal system to redress wrongs that are inflicted on widely dispersed groups of investors and consumers. The prescribed medicine is far too strong for the perceived, though unsubstantiated, problem. There are ample alternatives that have recently been enacted that should be tried before being jettisoned in favor of a draconian measure that will curtail virtually all class actions.

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69. *See* FED. R. CIV. P. 23(f).

70. Legislation before Congress in 2000 would have required plaintiffs to provide notice to State Attorneys General of all proposed class action settlements and give the states 120 days to inform the Court of their view. *See* S. 353, 106th Cong. (1999). The bill was not acted upon prior to the end of the congressional session. It is submitted that this proposal was ill-considered. By giving State Attorneys General 120 days to respond, S.353 would have irrevocably delayed approval of settlement, to the detriment of plaintiffs, defendants, and the class. A better alternative would be to provide notice to the Attorneys General at the outset of the case, and web-wide publication of any settlement.