A CASE FOR COMPETITIVE BIDDING FOR LEAD COUNSEL IN SECURITIES CLASS ACTIONS

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I. INTRODUCTION

If there's one thing lawyers seem to hate, it's competition. Or it would at least seem that way by the array of lawyers who have spoken out against any process of competitive bidding in the selection of lead counsel in securities class actions.[1] This chorus has grown in strength in the face of a recent Third Circuit decision[2] and Ninth Circuit decision.[3] The Third Circuit held that competitive bidding for the position of lead counsel of a securities class action was generally not permitted under the Private Securities Litigation Reform Act of 1995 ("PSLRA").[4] On the heels of that decision, the Ninth Circuit recently decided that the district court erred in appointing class counsel based primarily on a showing of differences in potential attorney fees. The question is, after these decisions, what role, if any, does competitive bidding play in the selection of lead counsel in securities class actions?

This note will argue that competitive bidding should not be relegated to rare situations as the Third Circuit found appropriate under the PSLRA. Rather, an interpretation of the PSLRA that forbids competitive bidding is bad policy, and the PSLRA should be amended to allow the presiding judge to exercise his or her discretion to protect absent class members and insure a meaningful adequate representation test for the lead plaintiff in terms of negotiations with lead counsel.[5] The decision to apply an exacting level of scrutiny

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[1] Competitive bidding is also referred to as the "auction method," but for consistency it will be referred to as "competitive bidding."

[2] *See In re* Cendant Corp. Litig., 264 F.3d 201 (3d Cir. 2001).

[3] *See In re* Cavanaugh, 2002 U.S. App. LEXIS 18846 (September 16, 2002).

[4] *See Cendant,* 264 F.3d at 277 (In those rare circumstances where all possible lead plaintiffs showed themselves to be incapable of selecting counsel, the court, says the Third Circuit, might take a more active role in the selection of lead counsel.); 15 U.S.C. §78u-4 (2001).

[5] Harvard Law Review Association, *The Paths of Civil Litigation: V. Class Actions: Market Models for Attorneys' Fees in Class Action Litigation,* 113 HARV. L. REV. 1827, fn 1 (2000) ("Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the district court must exercise its inherent

to the relationship between the lead plaintiff and lead counsel should not be made in every case. Rather, the court must evaluate the general characteristics of the case, and make a determination as to the complexity of the particular issues. In the "ideal" cases, described in the next paragraphs, the court must apply a more exacting scrutiny of the adequacy of the lead plaintiff to competitively negotiate with lead counsel, or be willing to step in and perform their own competitive bidding process.

In addition, a modification of the PSLRA, to allow more competitive bidding, would not undercut the ultimate goals of the PSLRA. By careful implementation, a system of competitive bidding can insure the monitoring and reduction in agency costs originally sought by the PSLRA.[6]

The key characteristics[7] of "ideal" cases are well known to those involved in this debate and have been used by the judges that conducted competitive bidding.[8] In these cases,

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authority to assure that the amount and mode of payment of attorneys' fees are fair and proper. This duty exists independent of any objection [from a member of the class]." Zucker v. Occidental Petroleum, 192 F.3d 1323 (9th Cir. 1999)).

[6] While the PSLRA had numerous goals for securities class actions, on the issue of lead plaintiff selection and class counsel appointment the predominate goals were an increase in monitoring and reduction in agency costs. *See* Kevin P. Roddy et al., *Seven Years of Practice and Procedure Under the Private Securites Litigation Reform Act of 1995*, ALI-ABA Course of Study (July 18-20, 2002).

[7] The inclusion of all the characteristics described here is not necessary to merit a higher level of scrutiny, but the decision to apply exacting scrutiny is a determination of the presiding judge after considering the degree these characteristics are embodied by the case at bar.

[8] *See Third Circuit Task Force on the Selection of Class Counsel,* at 38 (January 2002), *available at* http://www.ca3.uscourts.gov/classcounsel/final%20report%20of%20third%20circuit%20task%20force.pdf; Statement of Arthur Miller, *Third Circuit Task Force*, Appendix B, Volume 2, at 23-24 (June 1, 2001); Howard M. Erichson, *Coattail Class Actions: Reflecting on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation,* 34 U.C. DAVIS L. REV. 1, 3 (2000); Randall S. Thomas & Robert G. Hansen, *Auctioning Class Action and Derivative Lawsuits: A Critical Analysis*, 87 NW. U. L. REV. 423, 455 (1993).

the defendants have accepted or stipulated liability, there is a great deal of information from a criminal or government investigation (particularly the Securities Exchange Commission ("SEC")), information has been widely dispersed through the public via the media or other institutions, the issues in the case are clearly defined, the defendant is not on the verge or likely to enter bankruptcy, and there is the likelihood of a very large recovery for the class.[9] In addition, the action is frequently a consolidation of numerous suits brought by different counsel to help insure a sufficient number of participants in the competitive bidding process. However, it is not important that the cases exhibit all of these characteristics; rather these criteria should be factors for consideration by the court in assessing the necessity of performing a competitive bidding selection.

This note has three sections. The first section will address some of the major criticisms of competitive bidding. To answer these critiques, that section will begin with a description of competitive bidding. Then, by addressing the costs and benefits of competitive bidding, the section will show that competitive bidding has the potential to become a valuable tool for judges in securities class actions.

To support these arguments, the second section provides an empirical analysis of some of the claims made in the first section. From an examination of three class action samples, this note will show that the market for plaintiff's counsel in securities class actions is very concentrated, the percentage recovery of attorneys' fees is systematically lower in competitive bidding cases, and that if current lead counsel selection arrangements are maintained in "ideal" cases, the lead counsel will receive an excessive risk premium.

In the final section, this note will address the other major criticism of competitive bidding; it is statutorily forbidden under PSLRA, made especially clear by the Third Circuit's recent *In re Cendant Corp. Litigation* decision.[10] Since that decision, and the publishing of the *Third Circuit Task Force*

[9] *See Third Circuit Task Force, supra* note 8, at 15.

[10] *See* 15 U.S.C. § 78u-4 (2001); 264 F.3d 201 (3d Cir. 2001).

Report on the Selection of Class Counsel, there has been a sense that the end of competitive bidding is near for securities class actions.[11] While under the current statutory regime competitive bidding is *severely* limited in securities class action, this note will advocate a change to the PSLRA that will broaden the opportunities for competitive bidding. Such an amendment will not undercut the primary goals of the PSLRA's counsel selection rule and will remain faithful to the congressional intent of the PSLRA in light of the reality of its adoption in the last seven years. In addition, recent proposed amendments to Federal Rules of Civil Procedure ("FRCP") Rule 23, concerning appointment for class counsel, provide a further basis to implement competitive bidding.

In the end, hopefully this note can convince the reader of the important role of competitive bidding. It is both consistent and appropriate under the purpose and goals of the PSLRA. Competitive bidding is a new phenomenon that has not been highly developed in the courts and to close the door on it now will exasperate many of the problems PSLRA sought to rectify.[12]

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[11] *See* Tamara Loomis, *Lead Counsel Auctions: Task Force Warns Against Bidding In Class Actions*, 226 N.Y. L.J. (Thursday, November 1, 2001). *See also Third Circuit Task Force on the Selection of Class Counsel, supra* note 8, at 38.

[12] Only 14 courts have implemented competitive bidding since its inauguration in 1990. *In re* Oracle Sec. Litig., 131 F.R.D. 688 (N.D. Cal. 1990); *In re* Wells Fargo Sec. Litig., 157 F.R.D. 467 (N.D. Cal 1994); *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190 (N.D. Ill. 1996); *In re* California Micro Devices Sec. Litig., 168 F.R.D. 257 (N.D. Cal. 1996); *In re* Cendant Corp. Litig., 182 F.R.D. 144 (D.N.J. 1998); *In re* Network Assocs. Inc., Sec. Litig., 76 F. Supp. 2d 1017 (N.D. Cal. 1999); Sherleigh Assocs. LLC v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688 (S.D. Fla. 1999); In re Lucent Techs. Inc. Sec. Litig., 194 F.R.D. 137 (D.N.J. 2000); *In re* Bank One S'holders Class Actions, 96 F. Supp. 2d 780 (N.D. Ill. 2000); Wenderhold v. Cylink Corp., 188 F.R.D. 577 (N.D. Cal. 1999); *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71 (S.D.N.Y. 2001); *In re* Quintus Sec. Litig., No. 00-C-4264 & 00-C-3894, 2001 WL 709204 (N.D. Cal. Apr. 12, 2001); *In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re Lead Plaintiff Selection and Class Counsel Selection

II. FUNCTIONAL DISCUSSION OF COMPETITIVE BIDDING

Taking a look at the functional arguments first, the benefits of competitive bidding are real and have the potential to address some of the problems with the current method of class counsel selection. For example, competitive bidding has the potential of opening the highly concentrated market for plaintiff's counsel legal services, where a few firms litigate most securities class actions. In addition, competitive bidding can offer a real reduction in attorneys' fees, meaning a larger percentage recovery for class members.[13] Much of the savings on fees occurs through the reduction in the risk premium received by counsel, because as will be shown, the cases in which competitive bidding should be applied do not carry the same level of risk of non-recovery to plaintiff's counsel under the contingency fee regime. Finally, while the problems of competitive bidding can be serious, given the nascent status of competitive bidding, it seems likely that with further experimentation and experience many of these problems can be overcome.

A. Origin

Before considering the functional argument, a brief description of competitive bidding is appropriate. Competitive bidding for lead counsel had its origins in securities litigation in the Northern District of California,

(N.D. Cal. June 27, 2001); and *In re* Comdisco Sec. Litig., 141 F. Supp. 2d. 951 (N.D. Ill. 2001).

[13] One problem with this analysis is the inability to measure empirically any *actual* benefit to the class members. Although it will be shown that percent recoveries are higher under competitive bidding, the absolute level of recovery between the two methods cannot be compared. It is a possibility that while competitive bidding results in a higher percentage recovery, it could provide a lower absolute recovery. For example, 90% of $10 million is less than 75% of $20 million. The inability to make this comparison is a shortfall in this analysis, but the analysis of success rates between the different class samples should alleviate some of the concern.

under Judge Vaughn Walker.[14] Judge Walker became frustrated with the seeming collusion between lawyers competing for the role of lead counsel, and decided to solicit bids from law firms to serve as lead counsel.[15] To understand both his frustrations and some of the problems with other methods of class counsel selection, an examination of the other methods is necessary. In addition, these methods highlight some of the problems with lead counsel selection that the Congress attempted to redress under the PSLRA.[16]

The selection of lead counsel in a securities class action is very important. The lead counsel effectively controls the conduct of the class action, and assigns lawyers work, thus allowing the lead counsel to choose to take home the majority of any fees.[17] The most common method for selection of lead counsel is "first to file,"[18] also known as the "race to the courthouse."[19] In order to insure that the law firm is the first to file, plaintiff securities firms will maintain and recruit potential named plaintiffs.[20] This method has numerous

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[14] *Oracle*, 131 F.R.D. at 689.

[15] "The prospect of competition, it seems, brought peace to the fractious lawyers. But this resolution appeared self-serving to the lawyers and contrary to the interests of the class." Statement of Judge Vaughn R. Walker, Testimony before the 3rd Circuit Task Force on Selection of Class Counsel, March 16, 2001.

[16] "The Private Securities Litigation Reform Act of 1995 was designed to remedy the perceived problem that securities class actions were brought and controlled by lawyers rather than class plaintiffs." *See Third Circuit Task Force on Selection of Class Counsel*, *supra* note 8, at 75 (citing H.R. Conf. Rep. No. 104-369 at 35 (1995)).

[17] Elliot J. Weiss & John S. Beckerman, *Let The Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2062 (1995) (citing Garr v. U.S. Healthcare, 22 F.3d 1274, 1277 (3d Cir. 1994) ("The lead attorney position is coveted as it is likely to bring its occupant the largest share of the fees generated by the litigation.")).

[18] Some have said one goal of the PSLRA was to eliminate the "race to the courthouse" method of lead counsel selection. *See* Sherleigh Assocs v. Windmere-Durable Holdings, Inc., 186 F.R.D. 669, 694-95 (S.D. Fla. 1999).

[19] *See* Weiss & Beckerman, *supra* note 17, at 2062.

[20] *See In re* Cendant Corp. Litig., 182 F.R.D. 144, 145 (D.N.J. 1998) ("['Race to the courthouse'] spawned a cottage-industry of specialized

drawbacks. First, there are no incentives for counsel to consider the merits before filing because any delay could result in a loss of the lead counsel role.[21] Second, there is no guarantee that the "first to the courthouse" will offer the highest quality of legal services for the class.[22]

In addition, "first to file" can cause many conflicts between rival law firms. To avoid conflict, the firm that is the "first to file" will sometimes share its complaint with other firms so that they will support its position as lead counsel.[23] In this manner, the selection of lead counsel becomes a matter "of private orderings." Therefore, if the selection process gets put into the hands of counsel, this "first to file" will get support from those with whom he or she shared work.[24] Generally, these negotiated settlements amongst rival law firms call into question the congruence of interests between counsel and class.[25]

Given the state of lead counsel selection, in 1995 Congress attempted, amongst other goals, to address these problems by passing the PSLRA.[26] Under the PSLRA, a new

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securities litigation firms that research potential targets for these suits, enlisted plaintiffs, controlled the course of litigation, and often negotiated settlements that resulted in huge profits for law firms with only marginal recovery for the shareholders.") (quoting Gluck v. Cellstar Corp., 976 F. Supp. 542, 544 (N.D. Tex. 1997)).

[21] *See* Jill E. Fisch, *Complex Litigation at the Millennium: Aggregation, Auctions, and Other Developments in the Selection of Lead Counsel Under the PSLRA*, 64 LAW & CONTEMP. PROB. 53, 57 (2001).

[22] *Id.*

[23] Weiss & Beckerman, *supra* note 17, at 2063.

[24] *Id.*

[25] Statement of Judge Walker, *supra* note 15 ("Private resolution by counsel seemed] contrary to the interests of the class."). *See also* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in Large Class Actions*, 54 U. CHI. L. REV. 877, 907 (1987).

[26] Craig C. Martin & Matthew H. Metcalf, *The Fiduciary Duties of Institutional Investors in Securities Litigation*, 56 BUS. LAW. 1381, 1382 (2001) ("The major impetus behind the PSLRA was the widespread perception that securities fraud class action lawsuits had become little more than a mechanism used by plaintiffs' lawyers to build their own wealth.").

method of lead counsel selection was devised using a statutory regime.[27] According to this statute, the named plaintiff is presumptively considered to be the individual or institution with the largest financial stake in the claim, subject to the prerequisites of FRCP Rule 23(a).[28] The statute then allows for the named plaintiff to, "[s]ubject to the approval of the court, *select and retain counsel* to represent the class."[29] Most courts have applied the PSLRA to allow only the statutory lead plaintiff to select counsel. Some, however, as before the passage of the PSLRA, have conducted a competitive bidding process to select lead counsel when the judge believed the lead plaintiff had inadequately selected counsel.[30]

B. Competitive Bidding Structure

Now that we have examined the development of competitive bidding and general selection of lead counsel, it's important to gain an understanding of how competitive bidding is conducted by the courts. The general aim of competitive bidding is to imitate the market for legal services.[31] While there is no one format courts have used to conduct competitive bidding, the following is an overview of the typical methods used in the fourteen cases that have conducted competitive bidding for the selection of lead counsel.

In these cases, the process has generally occurred very early in the litigation.[32] Most have occurred before the opening of discovery or the rulings on any dispositive

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[27] 15 U.S.C. § 78u-4(a)(3)(B)(v) (2001).

[28] 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I) (2001); *see also* Fed R. Civ. Pro. 23(a).

[29] 15 U.S.C. § 78u-4(a)(3)(B)(v) (2001) (emphasis added).

[30] *See* list of courts to conduct competitive bidding, *supra* note 12.

[31] Laura L. Hooper & Marie Leary, *Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study*, FEDERAL JUDICIAL CENTER 1 (August 29, 2001).

[32] *Id.* at 25.

motions.[33] In the nine cases of competitive bidding since the PSLRA, most have appointed the lead plaintiff and then sought bids from law firms to represent that plaintiff.[34] However, Judge Shaduar in *Bank One Shareholders* and *Comdisco* appointed the lead plaintiff simultaneously as he conducted the competitive bidding for lead counsel.[35]

Also, in all but one of the competitive bidding cases, the competitive bidding was held before certification of the class under FRCP Rule 23. The reasoning for this timing is that Rule 23(a)(iv) requires the court to make a determination of the adequacy of representation, which cannot be made until the class counsel has been selected.[36]

On the issue of who can participate in the bidding process, most courts have opened it up to any qualified law firm, including those that did not initially file a complaint in the matter.[37] In addition, Judge Walls, in *Cendant,* allowed the law firm initially selected by the lead plaintiff to have the right of first refusal to match the lowest bid gathered through the process.[38]

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[33] *Id.*

[34] *Id.* at 26.

[35] *Id. See also In re* Bank One S'holders Class Actions, 96 F. Supp. 2d 780 (N.D. Ill. 2000); *In re* Comdisco, 01-C-2110, Memorandum Opinion and Order (N.D. Ill. June 27, 2001).

[36] *See* Fed. R. Civ. Pro. 23(a)(iv).

[37] *See* Hooper & Leary, *supra* note 31, at 28 ("With only three exceptions, the courts have opened the bidding to any attorney or firm anywhere in the country interested in serving as class counsel whether or not they had filed a complaint. . . .").

[38] 182 F.R.D. 144, 151 (D.N.J. 1998). A right of first refusal may create harmful incentives for bidding. Firms may be unwilling to participate if they know they could lose to the selected counsel. This is the effect of the "winner's curse." If other bidders suspect that the original counsel has additional information, they will likely refrain from bidding, because the original counsel will only exercise their right of first refusal if they believe the claim is worth more than the fee. Knowledge of this effect will keep bidders from participating. In addition, a right of first refusal may create a perverse incentive for the selected counsel to match the lowest bid, without serious consideration of the firm's ability to litigate the case at another firm's fee structure. In my proposal for competitive

Courts that conducted competitive bidding generally started by requesting a detailed submission of the law firm's qualitative features in order to insure the sufficient quality of representation.[39] The magnitude of these requests has grown in detail in the eleven year period since Judge Walker first used competitive bidding in *Oracle*.[40] Courts also request the law firms' experience in securities class actions, which has required case-specific discussion of issues, parties and settlement totals.[41]

Besides a qualitative submission, the courts have asked for a detailed fee submission. Like the process of qualitative submissions, fee submissions have become more detailed over time, as courts have developed the practice.[42] In most cases, the courts have asked for a litigation "milepost" grid, where the percentage fees change depending upon the particular stage of the litigation at which settlement is reached and the amount of total settlement. In more recent cases, the judges provided a grid of outcomes and stages and asked potential bidders to fill in their percentage recovery for each.[43] The firms have also had to verify that their bids were independent and not coordinated with other firms.[44] The courts also have asked firms to consider how expenses will be subtracted.[45] Finally, as part of the quantitative submissions, the courts have asked the firms to give an assessment of the case to insure that the bidder has carefully considered the merits and likely outcomes.[46]

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bidding I will argue there should be no right of first refusal in the bidding process, as the likely effect will be to discourage bidding.

[39] Hooper & Leary, *supra* note 31, at 29.

[40] *Id.*

[41] *Id.* at 29-31.

[42] *Id.* at 31.

[43] *Id.* (citing *In re* California Micro Device Sec. Litig., No. 94-C-2817, 1995 WL 476625 at *3 (N.D. Cal. 1995)).

[44] *Third Circuit Task Force*, *supra* note 8, at 36.

[45] Sherleigh Assocs. v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688, 696-97 (S.D. Fla. 1999).

[46] *Id.*

One issue that runs throughout the competitive bidding process is the extent to which it opens the presiding judge to either the appearance of or opportunity for bias towards one of the parties.[47] Clearly if the judge proceeds with competitive bidding, there appears a presumption of liability that could put pressure on the defendants to settle. Also, to the extent that the court is examining the merits of the case ex ante it raises concerns amongst the litigants and impacts the incentives for settlement.[48] A potential solution to this problem is to use magistrate judges for the selection process.

C. Benefits

One of the primary criticisms of competitive bidding is that it does not work and causes more problems than it solves. Therefore, the particular benefits and criticisms of the process must be evaluated to determine whether competitive bidding is even worth using. Putting aside the issue of statutory authority for conducting competitive bidding under the current PSLRA, this section will show the potential benefits of competitive bidding. The primary benefits of competitive bidding are: a replication of the marketplace for legal services; an openness in the process of counsel selection; a reduction in excessive risk premiums; a reduction in free-riding by plaintiff's counsel on government investigation; and a reduction in agency costs through the ex ante attorney fee negotiations.

The most common justification for competitive bidding in the selection of lead counsel is that it replicates the marketplace for legal services and thus insures the most

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[47] *See* Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 692 (2002) ("In conducting a lead counsel auction, the court may also bias itself with respect to the future course of the litigation.").

[48] This argument too becomes undercut by circularity. If liability is clear, the defendants would already have an incentive to settle, so the decision by the court to conduct competitive bidding may be a false signal of the defendant's willingness to settle.

competitive price for the legal services of the class.[49] Many courts have found that in comparison to traditional methods of determining attorneys' fees ex post, by either the lodestar or percentage-of-the-recovery method, competitive bidding is a better alternative for determining market priced legal services.[50] This seems like the strongest argument in favor of competitive bidding because it allows market pressures to determine an arm's-length fee.

Besides replicating the marketplace for legal services, competitive bidding also opens up the process of counsel selection. To the extent the current market for plaintiff's counsel services is concentrated in a few firms, or determined by "collusion or favoritism," a competitive bidding process can break that concentration by offering new entrants the opportunity to compete for the provision of services. This might also improve the quality of counsel.[51] A more open process with a larger variety of actors involved in the providing of legal services in securities class actions could have the effect of improving the overall quality of those services.

In addition to reducing fees, competitive bidding also allows the class to recapture some of the risk premium that is implicit in the attorneys' fees of most class actions. Attorneys' fees received from a securities class action are a combination of different components: payment for the attorney's time and effort plus a standard mark-up on that

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[49] *See In re* Bank One S'holders Class Actions, 96 F. Supp. 2d 780, 785 (N.D. Ill 2000) ("If that [sealed bidding] process evokes a significant number of bids from well-qualified law firms or law firm combinations it is best calculated to provide precisely the efficient market information that serves as the 'ideal proxy' for the one-to-one lawyer-client agreement in conventional litigation.").

[50] *Id.* at 785-86 ("holding that either the lodestar approach or percentage-of-the-recovery method may properly be used to calculate fees in common fund cases, nonetheless identif[ying] the deficiencies of each of those methods in failing to replicate the free market for legal services") (citing *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 51 (2d Cir. 2000)).

[51] *See*, Fisch, *supra* note 47, at 673 ("[A]n auction offers the potential for greater objectivity.").

time, a risk premium associated with the likelihood that the law firm will walk away from the case with no fees and lost time and expenses. Because plaintiff's counsel is paid on a contingency fee basis, every successful claim must, in part, pay for an unsuccessful one.[52] The general characteristics of the cases described previously as "ideal," to which competitive bidding should be applied, mean that the plaintiffs will likely succeed on their claims. Since these cases are likely to "payout" to the plaintiff's counsel, they should charge a lower risk premium to the class. As Judge Kaplan stated in *In re Auction Houses Antitrust Litigation*, these cases are "like finding a pot of gold in the middle of the sidewalk."[53] However, without a competitive process like bidding, it may be difficult to extract that premium from plaintiff's counsel. Competition amongst plaintiff's counsel through bidding should reduce those premiums.[54]

Moreover, in the reduction of risk in "ideal" cases without the reduction in fees, the plaintiff's counsel may be free riding on the work of government investigations.[55] Under this scenario, either before or during a class action, the government's investigation provides information for the suit. The effect of this free-riding is a wealth transfer from the

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[52] Since plaintiff's counsel only receive fees if the case is successful, there is a chance counsel will not receive compensation for the costs they incur litigating the case. *See* Janet Cooper Alexander, *Symposium: Contingency Fee Financing of Litigation in America, Contingent Fees and Class Actions*, 47 DEPAUL L. REV. 347, 350 (1998). Since ex ante plaintiff's counsel cannot know whether any particular case will be successful, counsel must charge a higher fee so that their successful cases can cover their losses from their unsuccessful ones. In this way, class members of successful cases are paying in part for the legal services their attorneys rendered in unsuccessful cases.

[53] In *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71 (S.D.N.Y. 2000).

[54] There may be a "spillover effect" with a reduction in fees in the low risk cases, which would require even higher fees in moderate to high risk cases to recover lost expenses. However, given the envisioned limited nature of competitive bidding, even under my proposed regime, this effect is likely to be minimal.

[55] *See* Erichson, *supra* note 8, at 41-46.

federal treasury to private attorneys, as the taxpayer-funded investigation does the work for the attorneys. Competitive bidding in "ideal" cases can help reduce this taxpayer subsidy to plaintiff's counsel in public cases where there is extensive government investigation. However, because the effect of competitive bidding is a wealth transfer from attorneys to class members, the work of the government investigation would still result in a transfer to the shareholders. Nevertheless, since the purpose of investigations by the SEC and other government agencies is to protect shareholders, this transfer seems more reasonable than one to lead counsel.

Another significant benefit of competitive bidding is a possible reduction in agency costs. This reduction is created because the ex ante fee determination creates an incentive program with counsel that can closely align the interests of the class and counsel and thereby reduce the agency costs. This structure can also aid the class in situations where the lead plaintiff is inattentive or unwilling to rigorously monitor the activity of the lawyers.[56] An ex ante fee structure, especially an increasing fee structure, should create a better alignment between the interests of the class to maximize recovery and the interests of class counsel to maximize fees. Determining the fee structure up front "dials in" the incentives that bear upon the activity of the lead counsel, thereby lessening the need for lead plaintiff to maintain a vigilant watch.[57] However, this benefit is much contested, as opponents of competitive bidding have argued it increases agency costs by driving a wedge between the class and their counsel.[58]

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[56] *See Third Circuit Task Force Report*, *supra* note 8, at 39 (citing *Auction Houses,* 197 F.R.D. at 82).

[57] *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations For Reform,* 58 U. CHI. L. REV. 1, 17-18 (1991).

[58] *See* Fisch, *supra* note 47, at 678-79 ("Because [an auction] fails to align counsel's interest with those of the plaintiff class at high levels of recovery, a declining percentage of recovery fee structure is especially

D. Criticisms

While this note would argue that the benefits of competitive bidding seem sufficient to justify its use in the appropriate circumstances, critics have found many problems with the system. The following are problems frequently raised about the use of competitive bidding for the selection of lead counsel in securities class actions.[59] The major criticisms are that competitive bidding does not really work because: it does not replicate the market for legal services; it fails to consider the correlation between quality and costs of counsel; it is decided by judges who are ill-equipped to determine the quality of counsel; it interferes with the plaintiff-counsel relationship, which the PSLRA sought to strengthen; it reduces incentives for counsel to find cases; it does not lend itself easily to the auction process; it creates a perverse incentives for counsel to settle too early; and it wastes judicial resources since the law mandates that attorneys' fees are reviewed after the litigation.

The first major criticism of the competitive bidding process is that it does not really replicate the market for legal services.[60] Critics argue that clients do not select their legal services solely on price.[61] The process of selecting an attorney is usually not done by visiting different attorneys and then choosing the best based on a combination of price and quality. Instead clients pick their attorneys through a process based upon intangibles, e.g., recommendations, friendships, or willingness of the counsel.

A corollary to that criticism is that there is a correlation between price and quality of counsel. Therefore, in a competitive bidding system the less qualified attorneys, who

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likely to create a significant moral hazard problem."). This problem seems to be reduced if the courts use an increasing percentage of recovery fee.

[59] Since the use of the auction under the PSLRA will be discussed in Part III, *infra*, the list of criticisms cited here does not include any of those involving the statutory limitations that the PSLRA imposes on the appropriateness of conducting an auction for lead counsel.

[60] *See* Fisch, *supra* note 21, at 83.

[61] *Id.*

charge the lowest fees, get the cases. Everyone knows not always to buy the cheapest because frequently the cheapest means the worst quality.[62] This seems to be the strongest argument against competitive bidding as well as the most difficult to refute. This criticism takes on added force since the goal of the plaintiff class is not to maximize their return from any settlement but rather to maximize their total return on a claim. Therefore, to the extent that a more expensive counsel can achieve a higher net settlement, the plaintiff class would unanimously prefer the more expensive counsel.

There are, however, a few responses to these criticisms. First, the court can set a threshold of quality.[63] The courts that have previously used competitive bidding have been able to screen the potential bidders to insure they are able to litigate the cases effectively. If we look both at the firms that have been selected under competitive bidding and their success rate in achieving a class recovery, the concerns about getting poor quality counsel does not seem too realistic, if the process is properly administered.[64]

A related criticism is that judges cannot appropriately differentiate the quality of counsel. This criticism is

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[62] Statement of Samuel Issacharoff, *Third Circuit Task Force Report*, Appendix B, Volume 1, at 4 (May 5, 2001) ("As with dentistry, there may be some pain associated with delivering yourself to professionals whose chief attribute is their willingness to work you over cheaply.... If we may assume that the interests of absent class members consist chiefly in maximizing the return from the prosecution of their claims, there is no reason to believe that the lowest percentage bidder can realize that goal. The lowest percentage bidder may simply be lawyers with lesser overhead, lesser ambition, or volume discounters.").

[63] Naturally, there is a small class of firms with sufficient expertise to litigate these cases, but hopefully over time that pool of experience will grow, especially if the strong grasp of Milberg, Weiss, Berhad, Hynes & Lerach LLP ("Milberg") on these cases is loosened. *See infra* Part III.B.i.

[64] A visual inspection of the firms would seem to indicate that there should not be too much concern about their quality. These quality firms include Milberg; Boies & Schiller; and Bernstein, Litowtiz, Berger & Grossman LLP. For example, these firms currently have a 100% success rate in achieving class recovery in cases conducting competitive bidding. *See* Appendix C, *infra*.

intertwined with the previous argument that with cheaper fees, one gets a worse quality of representation. The basis for this critique is that judges are not involved in the process of counsel selection and therefore do not have a basis to measure quality. On top of that, the institutional investors, whom the PSLRA sought to impose as the presumptive plaintiffs, have developed a sophisticated selection process for legal services and are therefore better at selecting the best value counsel.

Another criticism of competitive bidding is that it frustrates the goal of the PSLRA by driving a wedge between the plaintiff's counsel and plaintiff class. The PSLRA envisioned that by giving institutional investors the presumptive right to serve as named plaintiff and select counsel, it would create the incentive to increase monitoring of class counsel to reduce agency costs.[65] The named plaintiff can seemingly best monitor counsel by appointing his or her own counsel. Therefore, if the judge conducts competitive bidding and selects counsel, his selection may reduce the incentives for the named plaintiff to monitor effectively.

Moving away from the specifics, some critics have been worried about the incentives competitive bidding will have on the structure of the plaintiff's bar. While frequently criticized in the main press as "ambulance chasers," plaintiff-attorney-driven litigation does serve an important social purpose.[66] This is especially true in the class action framework where the entrepreneurial spirit of plaintiff attorneys can remedy particular ills, especially those that are too small to overcome collective action problems.[67] With competitive bidding, the attorney that puts in the research to find the case may not receive the work and may not be

[65] *See* Fisch, *supra* note 47, at 702-03.

[66] Although this is true, one of the major reasons Congress passed PSLRA was to curb what they saw as excessive attorney driven litigation in the field of securities.

[67] *See* Macey & Miller, *supra* note 57, at 8.

adequately compensated for that effort, which then may create a disincentive to do this socially desirable work.[68]

However, this concern can also be overcome by considering the application of competitive bidding. It is true that indiscriminate application of competitive bidding could put serious pressure on the incentives of attorneys to seek out cases. But since competitive bidding should be relegated to the "ideal" cases, incentives affecting the entrepreneurial attorneys are not pertinent to this discussion. Since these "ideal" cases have garnered a great deal of public attention and scrutiny, there are minimal search costs for the plaintiff's counsel.[69] Given the limited nature of these cases, we are unlikely to see the "entrepreneurial" attorney disappearing. In the "ideal" cases, plaintiff's counsels will incur "marketing costs," instead of "search costs," in an attempt to become lead counsel. These are costs society should feel comfortable allowing them to bear, and should not believe that these types of costs could ever become so excessive as to cause any harm to the current market for plaintiff's counsel.

In addition, under the PSLRA statutory regime for the selection of lead plaintiff in traditional securities class actions counsel the selection by the presumptive lead plaintiff.[70] Under this method, it is also likely that attorneys who incur search costs may be under-compensated, as the presumptive lead plaintiff has the right to freely select counsel. Therefore this critique, for what it is worth, is not unique to competitive bidding under the PSLRA, given the guidelines for conducting competitive bidding. In addition, under the PSLRA the search costs for plaintiff's counsel may

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[68] *See Third Circuit Task Force Report*, *supra* note 8, at 53-54 ("The auction process reduces the incentive for plaintiffs' firms to investigate potential claims, because the investigating firm must consider the risk of losing the bidding process and having to internalize its up-front expenses."). *See also* Fisch, *supra* note 21 at 93-94.

[69] *See* Erichson, *supra* note 8, at 1 (discussing private litigation following public investigation).

[70] *See* 15 U.S.C. §78u-4(a)(3)(B)(v) (2001).

increase since it is imperative they retain institutional investors who are likely to be named plaintiffs.

Another concern with competitive bidding is that lower upfront fee structures create incentives for attorneys to settle earlier in order to insure a sufficient return.[71] If attorneys bid too low, they will not receive sufficient fees to cover the time needed to vigorously litigate the claim, rendering them more likely to accept an early, low settlement.[72] However, as discussed above, the opposite effect is equally as likely. Most fee structures under competitive bidding utilize a stepladder technique, where percentage recovery increases with each specific level.[73] Therefore, plaintiff's counsels have an incentive to seek the highest settlement to increase their fees. In addition, this criticism assumes a strong positive correlation between time and settlement for plaintiff's counsel, an assumption that is not necessarily true.[74]

An additional response is that the incentives to settle quickly and low is not unique to the competitive bidding circumstances. In *In re California Micro Devices Sec. Litigation*, Judge Walker rejected the initial settlement reached quickly by plaintiff-selected counsel as being too low.[75] He eventually had a competitive bidding process and the ultimate settlement received by the class was two and a half times the original settlement offer.[76]

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[71] *See* Statement of Samuel Issacharoff, *supra* note 62, at 5.

[72] *Id.*

[73] John C. Coffee, Jr., *The PSLRA and Auctions*, N.Y. L.J., May 17, 2001, at 5. ("[A]uctions are also a technique for incentivizing counsel to obtain larger recoveries. . . .[B]oth courts used an increasing percentage-of-the recovery fee formula that started low. . . and then rose as the recovery exceeded specified levels.")

[74] If we look at the data from the "benchmark" sample, *infra* Section III, we see that if we assume expenses serve as a proxy for time spent on the case, there isn't a strong positive correlation between expenses and settlements. The correlation value is 0.59. (A "1" would be a perfect correlation, and a "0" means no correlation).

[75] *See* Statement by Judge Walker, *supra* note 15, at 5.

[76] *Id.*

Another major criticism of competitive bidding concerns its general feasibility. Some say there are too few bidders to resemble the market for legal services.[77] In addition, others argue that a two dimensional auction using quality and price is difficult to administer and likely to be ineffective.[78] There are two responses to these criticisms, which should allay some fears. First, the auction method has only received limited use and is continuing to develop as a viable method of selection class counsel.[79] As its acceptability and use increases, more firms will be willing to engage in the process, as they will see it as an opportunity to break into a concentrated market and capture some of the profits that have gone to a few firms. In addition, with the elimination of the right of first refusal to the selected counsel, there are likely to be more bidders.

A second response is that effective competitive bidding simply requires more than one bidding firm. Once you have two firms that are unable to collude in the establishment of attorney fees, competition for the role of lead counsel is likely to result in a reduction in attorney fees. Given the view that plaintiff's counsel is overly compensated in these types of cases, any reduction in the attorneys' fees indicates that competitive bidding is effective.

A final criticism of competitive bidding is that since the court is obligated to review attorneys' fees after any decision or settlement in a class action, conducting an auction is duplicative and a waste of judicial resources.[80] While there is

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[77] *See Third Circuit Task Force*, *supra* note 8, at 54-55; *see also* Fisch, *supra* note 21, at 90 ("Several of the cases in which courts have used auctions suggest that the risk of limited bidder participation is real.").

[78] *See*, Fisch, *supra* note 47 at 688-90 ("Even assuming that it is possible for the court to specify such a preference function [choice between price and quality], the limited economic literature suggests that designing an appropriate multidimensional auction is extremely difficult.").

[79] *See* Appendix B, *infra*. (Since its introduction, there have been only fourteen cases that have conducted selection of lead counsel through competitive bidding.).

[80] *See* 15 U.S.C. § 78u-4(a)(6); *see also Third Circuit Task Force Report*, *supra* note 8, at 44 ("Even if the auction proceeds as envisioned at the time of bidding, the auction will probably save the court little time in

some truth to this, however, the level of ex post review will be reduced under competitive bidding.[81] According to Judge Walker, "[a]bsent class members whose legal rights are affected in a class action are entitled to the same protection of their interests vis-à-vis the attorneys who represent those interests as an informed and diligent plaintiff in an individual action. That level of protection is simply impossible to achieve if fees are determined after the outcome of the litigation is known."[82]

Now that we have examined the potential benefits and problems of competitive bidding, what does this say about the functional arguments against competitive bidding? While competitive bidding certainly is not a panacea for securities class action, it does appear to have some potential benefits. There is one point of agreement by everyone involved in considering competitive bidding, and that is that competitive bidding is very much a new phenomenon. The question now is whether to cut it off before it has a chance to develop or to nurture the experiment of competitive bidding to determine if it can feasibly address some of the problems in securities and all class actions that no one would dispute exist. The next section will look at some empirical analysis of the issues raised in this past section.

III. EMPIRICAL ANALYSIS

In order to test these descriptive arguments in favor of competitive bidding, an empirical analysis was done to quantify the reality of these benefits, or the problems in the market that competitive bidding could fix. There are three hypotheses this empirical analysis will test:

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the way of ex post assessment of attorney fees. This is because Rule 23 requires courts to review the reasonableness of attorney fees at the end of the case.").

[81] *See* Hooper & Leary, *supra* note 31, at 18 (citing *In re* Amino Acid Lysine, 918 F. Supp. 1192 (N.D. Ill. 1996) (Judge Shadur thought ex ante fee arrangements through competitive bidding would reduce the use of judicial resources in reviewing numerous fee applications.)).

[82] Statement of Judge Vaughn Walker, *supra* note 15, at 5.

- The current market for plaintiff's counsel in securities class action is highly concentrated.
- Class members receive a significantly larger percentage return from the settlement if a competitive bidding process is conducted for lead counsel selection as measured by percentage recovery of total settlement.
- For cases that we have described as "ideal" for competitive bidding, the current system of class counsel selection results in an excessive risk premium to lead counsel.

An empirical analysis of lead counsel appointments was performed to test the validity of these hypotheses. The work that was done is far from any statistical certainty. However, this examination of securities class action does provide a better approximation than simple anecdotal evidence of what issues or gains there are from competitive bidding, as well as highlights some of the potential problems we may have in our current system. In the following two sections this note explains the methodology and the results derived from that study.

A. Methodology

In order to test these hypotheses, it was necessary to devise a method to compare the current system of lead counsel selection in securities class action with a system of competitive bidding. In addition, it is important how we might separate out traditional cases, under our current system of counsel selection, from those identified as "ideal". Do we see any systemic difference between these "ideal" cases against the "benchmark" case that may raise questions about the appropriateness of competitive bidding? Testing these hypotheses required the creation of three samples of securities class action cases: a "benchmark" sample; a "competitive bidding" sample; and an "ideal" sample. The method by which each one was created is outlined below.

1. Benchmark Sample

The "benchmark" sample is representative of the current situation in securities class action litigation. Therefore, the best manner in which to create this sample is by a random draw of all securities litigation since the PSLRA. This sample was created from data available on Stanford Law School's *Securities Class Action Clearinghouse.*[83]

The Stanford Clearinghouse contains filings for all securities class actions issued since 1991. As of February 23, 2002 there were 2,309 securities class action litigation filings on the database since its creation in 1991.[84] Of that number, 1,461 were filed since the passage of the PSLRA, including 25 for the year 2002.[85]

The major limiting factor with this database is the availability of specific data about the cases compiled by the Clearinghouse. However, there was a segment of the data designated as "Decisions."[86] This web page included 125 firms that have had class action suits filed against them since the passage of the PSLRA, and the Clearinghouse was able to procure a copy of some documents in the case.[87] These decisions included appointment of lead plaintiff, class counsel, dismissal of claims, settlement awards, or notice of settlements. Since the cases with decisions had a good amount of data, and given the limitations of data in general, it was decided the data sample on the "Decisions" web page would serve as a good approximation of a random draw of cases from the time period since Congress passed PSLRA in

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[83] *Securities Class Action Clearinghouse, at* http://securities.stanford.edu. (This database was the primary source of data of this sample as well as others.).

[84] *Securities Class Action Clearinghouse, at* http://securities.stanford.edu/index.html.

[85] *Id.*

[86] These are listed as cases in which the Stanford Securities Clearinghouse has been able to get an order or decision.

[87] *See Securities Class Action Clearinghouse* http://securities.stanford.edu/decisions.html. (The 125 cases were listed on the website as of March 1, 2002.).

1995. The dates that the complaints in the "benchmark" sample were filed range from February 7, 1996 to October 19, 2001.[88]

The data required of the sample was date of filing, lead counsels, disposition, any settlement and attorneys' fees and expenses. Most of the data was gathered by filings on the Clearinghouse website. However, to supplement missing data, Lexis-Nexis databases were used. As expected, complete data was not available for all 125 cases. For a certain number of cases data was unavailable because the suit was ongoing. Thus out of the 125 cases, only 95 cases were disposed of with either a dismissal or settlement, leaving 30 cases or 24.0% of the cases as ongoing at the time this data was compiled.[89] On the question of lead counsel there was data on which firms were selected for the role of lead counsel in 122 out of 125 cases, or 97.6% of the sample.[90] Finally in cases that settled, data on the total settlement or attorneys' fees was incomplete. Of the 42 cases that were settled, complete data on the amount of settlement and fees was available in 29 cases or 69% of the settled cases. Additionally, there was data on either settlement or attorneys' fees for another 6 cases. These limitations on the data were expected, but with a sample of 125, we are still left with enough robust data to test the hypotheses.[91] The data compiled on this sample is listed in Appendix A.[92]

Finally, as with any empirical analysis, the data is only as good as the assumptions. One key assumption in this study is that the 125 firms are a random sample of securities class action cases since the passage of the PSLRA.[93] The

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[88] *See* Appendix A, *infra*.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] The "benchmark" sample contains two cases that were found in the "competitive bidding" sample (Commtouch and Cylink). Compare, *infra*, Appendix A and Appendix B.

[93] Another possibility would be to select, at random, 125 firms from the total filing compiled within the Stanford Securities Clearinghouse. However, given the assumption that cases with decisions contained more

counterargument would be that there is some bias in the sample of cases with decisions. The direction or manner of that bias is not clear on its face. However, if the cases in which the Clearinghouse was able to get some type of decision were random, it would be safe to assume this sample is also random.

The one caveat to the randomness of the decisions is that the Northern District of California has instituted local Rule 23-2 that requires Internet posting of major securities fraud class action litigation filings.[94] This rule's impact is clearly evidenced by the high number of cases from the Northern District of California. A concentration of cases within the Northern District of California may have an impact on the examination of the concentration of the market for plaintiff's counsel, but that potential bias will be addressed at that time. In the end, limitations on the data or potential bias in the "benchmark" sample does not seem a significant barrier to conducting this analysis.

2. Competitive Bidding Sample

The second sample required to test the hypotheses is a sample of cases that have conducted competitive bidding. Since there have been very few cases that have used competitive bidding, this sample is able to include all of them. A recent study by the Federal Judicial Center study by Laura L. Hooper and Marie Leary, *Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study*, compiled information on all fourteen of the cases in which competitive bidding was used.[95] Since that report was published in August 2001, there has not been any change to the current available data on "competitive bidding," thus

information from which data could be calculated, it seemed a good sample to go with. If there is no bias between cases on the clearinghouse database with decisions, and those without, this sample of 125 firms is a good random sample.

[94] *See Securities Class Action Clearinghouse, supra* note 83, *at* http://securities.stanford.edu/info.html.

[95] *See* Hopper & Leary, *supra* note 31, at 1.

data for the "competitive bidding" sample was taken from that study.

This sample will test how competitive bidding operates and in what ways it differs from the average method of selecting lead counsel under the PSLRA. From this sample we can look at which firms were selected as lead counsel, the percentage of cases that were successful at achieving a recovery for the class and the range of attorneys' fees and expenses.

Although there are only fourteen courts that conducted competitive bidding, the data on this sample is still incomplete and limited in other ways.[96] Out of the fourteen cases that used competitive bidding for the selection of lead counsel, three were conducted before Congress passed the PSLRA in 1995.[97] However, given the incomplete data on this set of fourteen cases, these three cases were kept within the sample to ensure a more robust data set. Furthermore, two out of the fourteen cases were not securities cases but rather involved antitrust litigation.[98] Since we are looking at more of the functional aspects of the competitive bidding process, these two cases will stay within the dataset, but their presence and effect on any comparison with other samples will be accounted. The data for the "competitive bidding" sample is found in Appendix B.

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[96] Two of the cases were split into two portions, *In re Lucent Techs., Inc. Sec. Litig.* and *In re Cendant Corp. Litig. See Lucent Techs.* 217 F. Supp. 2d 529 (D.N.J. 2002); *Cendant*, 264 F.3d 286 (3d Cir. 2000); *In re* Cendant Corp. Prides Litig., 311 F.3d 298 (3d Cir. 2002). *See also* Hooper & Leary, *supra* note 31, at 13.

[97] *See* Appendix B, *infra* (*In re* Oracle Sec. Litig., 131 F.R.D. 688 (N.D. Cal. 1990); *In re* Wells Fargo Sec. Litig., 157 F.R.D. 467 (N.D. Cal. 1994); and *In re* California Micro Devices Sec. Litig., 168 F.R.D. 257 (N.D. Cal. 1996)). In *In re California Micro Devices*, the lead plaintiff conducted the auction.

[98] Id. (*In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190 (N.D. Ill. 1996); and *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71 (S.D.N.Y. 2000)).

3. "Ideal" Case Sample

The final sample in our empirical analysis is a sample that approximates for securities class action suits that had been previously designated as "ideal."[99] Therefore this sample is known as the "ideal" sample. In devising this sample, it was clear that characteristics described earlier for the ideal cases were going to be difficult to discern from the limited data available in Stanford Law School's *Securities Class Action Clearinghouse*.[100] In addition, looking at each case and making a subjective decision whether or not to include that case in the sample creates not only the appearance of data mining but also a strong likelihood of biasing the sample.[101] Therefore, search criteria were developed to screen for cases on Lexis-Nexis that would create an objective selection process for the "ideal" sample. By implementing a process-based method of selection, there is less of a propensity for bias or data mining.

The search was conducted on the Lexis-Nexis "Wall Street Journal" database. Within that database the following search command was entered, "*investigation* and *securities* and *SEC* and *financial*" with a date range of January 1, 1996 to February 20, 2002. The focus of this search was cases in which the SEC had conducted or announced an investigation into a particular company for securities fraud. It would be beyond the scope of this note to search for cases containing all or even many of the characteristics of the "ideal" cases. An SEC investigation is a particularly salient characteristic and would allow for easy

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[99] *See supra* Section II.

[100] *See supra* note 23, at 2063.

[101] Careful selection of the cases to comprise the "ideal" sample would be analogous to an ex post review of the merits of a case. An objective search procedure better represents the ex ante analysis a presiding judge would make on the merits of a particular case. A search procedure also prevents the possibility of determining inclusion by the ultimate disposition of the case. If the search were biased in this manner, it would destroy the validity of the sample as a means of analyzing success rates between the different samples.

observation.[102] In addition, the decision to use the "Wall Street Journal" database was also based upon the assumption that the Wall Street Journal is the dominant business newspaper. In addition, articles in the Wall Street Journal publication are likely to receive wide publicity. This database selection allows the sample to possibly catch some of the larger or more public characteristics of the "ideal" cases, as described above in Part II.

The search terms led to 101 "hits" on the Lexis-Nexis Wall Street Journal database. Of those 101 "hits," there were forty-five discrete announcements of either the beginning or conclusion of an SEC investigation.[103] These forty-five firms were then crosschecked against the Stanford Clearinghouse database to determine which securities class action suits were filed against the company under investigation. Of the forty-five companies, twenty-five had securities class actions filed against them in relation to the SEC investigation.[104] The relationship between the suit and the investigation was determined by comparing the date of the article in the Wall Street Journal with the date the complaint was filed.[105]

This sample of twenty-five cases is the basis for the "ideal" sample. As with the other samples, the key data sought for each case was the lead counsel, any settlement and the attorneys' fees awarded in settlements. However, in contrast to the "benchmark sample," there was not a significant amount of data available.[106] Thus, the use of this data was limited to testing the final hypothesis regarding the excessive risk premiums earned by plaintiff's counsel in "ideal" cases without competitive bidding. Using Lexis-Nexis, the outcome of most of the cases in this sample was

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[102] *See* Erichson, *supra* note 8, at 3.

[103] *See* Appendix C, *infra*.

[104] Within the sample of forty-five companies investigated by the SEC, there were also cases of SEC investigations of brokers, brokerage houses, or banks.

[105] *See* Appendix C, *infra*.

[106] This further supports the choice to utilize the "decisions" cases in the "benchmark" sample.

determined. Therefore this success rate is compared with the success rate of the "benchmark" sample. Ideally, attorneys' fees and expenses would be available but that data was primarily not available for this sample. However, it is a safe assumption that percentage of recovery for these cases is similar to that of the market as a whole, given the tight range of fee recoveries in non-competitive bidding cases, as evidenced by the results of the "benchmark" sample in Section B-2, *infra.*

B. Results

1. Market Concentration of Plaintiff's Counsel

The first hypothesis to test states that the market for legal services of plaintiff's counsel is highly concentrated. Of the 122 cases with counsel appointment, a total of seventy-two involved the law firm of Milberg, Weiss, Bershad, Hynes & Lerach LLP ("Milberg") as lead or co-lead counsel. That translates to 59% of all securities class actions in the "benchmark" sample being litigated by the same law firm. That leaves 50 out of 122 for all other firms, or 41% of the cases.

While this may seem high, a 1996 study of securities class actions has found that Milberg appeared in approximately 59% of all securities class actions since the adoption of the PSLRA.[107] A more recent study for Stanford found that for a sample of 1312 settlements, Milberg represented 31% of the cases.[108] In addition, a recent news article in USA Today

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[107] *See* John C. Coffee, Jr., *Developments Under the Private Securities Litigation Reform Act of 1995: The Impact After Two Years*, SC53 ALI-ABA 395, 402 (1997) (citing Joseph A. Grundfest & Michael Perino, *Securities Litigation Reform: The First Year's Experience* (Feb. 27, 1997) *at* http://securities.stanford.edu/research/studies/19970227/firstyr_firstyr.html/).

[108] Mukesh Bajaj et al., *Securities Class Action Settlements: An Empirical Analysis*, Nov. 16, 2000, at 13, *at* http://securities.stanford.edu/research/studies/20001116_ssrn_bajaj.html.

cited Milberg as the lead or co-lead counsel in about half of the last 700 securities class action suits.[109]

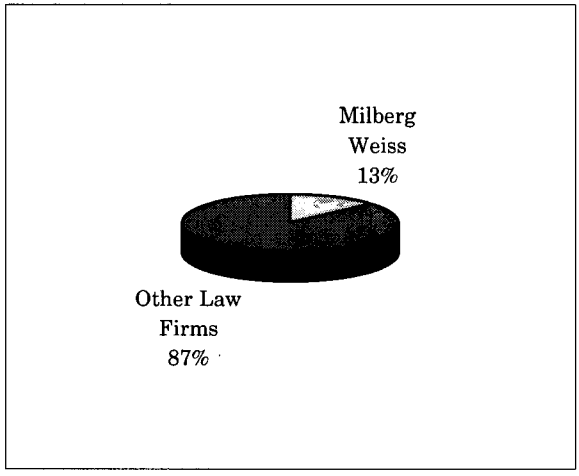
When we compare market concentration of the "benchmark" sample with the competitive bidding sample, we see a dramatically different result. Of the sixteen cases that conducted competitive bidding, there was information pertaining to the selection of lead counsel in fifteen.[110] In stark contrast to the "benchmark" sample, only two of the fifteen cases were litigated with Milberg as lead counsel, or 13.3% of the cases. This finding indicates that competitive pricing has the potential to increase competition in the market for the provision of plaintiff's counsel services. Figure 1 below provides a graphic comparison of lead counsel selection in the "benchmark" sample and auction sample.

[109] Edward Iwata, *Law Firms Tussle over Enron*, USA TODAY, Feb. 12, 2002, at 1B.

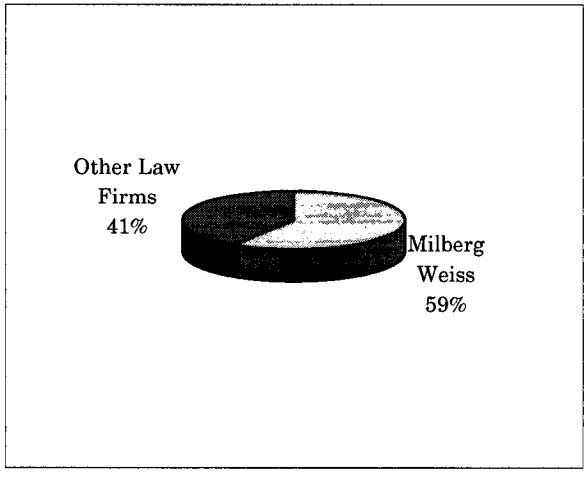
[110] The lead plaintiff is unknown only in *In re* Commtouch Software Ltd. Sec. Litig., No. 01-C-00719, Order Re Lead Plaintiff Selection and Class Counsel Selection (N.D. Cal. June 27, 2001).

Figure 1: Cross Sample Comparison: Lead Counsel Firms Competitive Bidding Sample v. Benchmark Sample

Competitive Bidding Sample



Benchmark Sample



This concentrated market has many ramifications, first and foremost of which is the likelihood of higher fees because

of less competition. This is explained by basic market economics. As firms achieve a greater market share, they realize market power and can drive up prices. If demand is held constant, and the supply of plaintiff's counsel is limited, market economics dictate that prices should go up.[111] Part of this problem may be exasperated by the operation of the PSLRA. With the presumption that the lead plaintiff is the largest financial stakeholder, firms that were well-positioned in the market at the time the PSLRA was passed would be in a better position to recruit these large clients. Only a few large plaintiff firms will be able to land these institutional investors as clients, causing further concentration in the market for services.

One outcome from this drive by plaintiff's counsel to sign up institutional investors as clients might be an increase in "search costs."[112] These are costs incurred by the firms in seeking out and recruiting individuals or institutions, both before potential litigation and afterwards. Naturally these costs must be recouped, and the only source of revenue is settlement funds. Therefore, these additional search costs, from the lead plaintiff framework of the PSLRA, are likely to be borne by the class members. Whether there has been a noticeable increase in costs or fees after PSLRA due to search costs is beyond the scope of this note. However, on a theoretical basis, this seem plausible providing further support for stricter scrutiny by the courts of the lead counsel selection process to ensure adequate representation for absent class members.

A significant impact of these search costs is the phenomenon of "pay to play." Many of the institutional investors that qualify for named plaintiff status are state pension funds, which because of their large size frequently qualify as the plaintiff with the largest financial stake. The recruitment of these large public and politically tainted

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[111] While this may be an oversimplification of the data, it is certainly not an unreasonable conclusion.

[112] These costs were also addressed in Part II, as part of the discussion regarding the potential problems with competitive bidding.

clients has ramifications for corruption in the retention of counsel.[113] Courts have already become concerned with allegations of "pay to play," a situation where the law firm makes political contributions to those politicians in charge of the pension funds.[114] The decision to conduct a competitive bidding process in *Cendant* was in part due to "pay to play" charges by a competing lead counsel who claimed that the counsel for the CalPERS group, consisting of three public pension funds, had made substantial campaign contributions to the New York State Comptroller.[115]

Perhaps this concentrated market may be excused because Milberg brings unique intangibles to the case. Naturally we should encourage and want clients to seek the best counsel they can for a suit, but an examination of the success rates in our "benchmark" sample, reveals that there is not a substantial difference between the success rates, i.e., achieving a recovery for the class, of Milberg and the rates for the other firms. Milberg won 28 out of the 61 decided cases they litigated in the "benchmark" sample, for a success rate of 45.9%. The group of other firms won 14 out of 34 total decided cases for a success rate of 41.2%. [116] Therefore, assuming an even distribution of success rate cases, we see no significant difference between Milberg and the class of other firms, with Milberg maintaining a 4.7% better success rate. This calls into question the presumption that Milberg's large concentration of cases is necessarily related to their ability to secure a successful disposition to the class, which would be highlighted by a difference in success rates between the two cases. Again, the constant shortcoming of this analysis is that it is impossible to analyze whether Milberg was able to get a higher settlement than other firms. However, while we cannot observe that data, we can look at the general success rate of each sample, in which no real

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[113] *See* John C. Coffee, Jr., *supra* note 73, at 5.

[114] *See* Fisch, *supra* note 18, at 79.

[115] *Id.* at 79 (citing *In re* Cendant Corp. Litig., 182 F.R.D. 144, 148-149 (D.N.J. 1998)).

[116] *See* Appendix A, *infra.*

difference is observed, and appreciate that competitive bidding should not be dismissed out of hand by the quality/cost argument.

From these results, what role does competitive bidding play in alleviating the tight market and encouraging a more competitive market for securities plaintiff's counsel? The competitive bidding process opens up the selection process to firms that have not been able to lock up the large financial institutions. In addition, it spreads the experience around, allowing other firms to gain the expertise to take a more active role in these cases.[117] Finally, by garnering the position of lead counsel, smaller firms can gather a "treasure chest" that will allow them to better bear the risk of failure found in most securities class actions. Therefore, if we allow competitive bidding in these particular cases, we could see a spillover effect into all securities class actions, as those firms that can break into the business with competitive bidding can become more competitive in their own right and hopefully increase the total supply of services in this market.

2. Percentage of Settlement Fund

To test the second hypothesis, the percentage recovery of attorneys' fees for the "benchmark" sample will again be compared with the "competitive bidding" sample. The percentage recovery for the "benchmark" sample ranged from 7% to 33% with a mean of 28.5% and a median recovery of 30%. This range is strongly supported by other empirical studies.[118]

Comparing the results of the "benchmark" sample with those of the "competitive bidding" sample, there is a stark difference. The range of percentage recovery of total settlements for competitive bidding cases is from 5.7% to

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[117] *See Third Circuit Task Force Report*, *supra* note 8, at 40-41.

[118] *Id.* (Statement by Professor Joseph A. Grundfest, *Third Circuit Task Force*, Appendix B, Volume 1, at 2 (June 1, 2001). In the 1990s, fee awards averaged 30% of the settlement with a reasonable range of 25% to 33%.).

19.2%, with an average recovery of 10.8% and a median of 8.2%. These results do not include the returns for the antitrust cases, which would have dropped the low range to 5.2%, the mean to 9.7% and the median to 7.8%. Table 1 below shows the results of this comparison.

Table 1: Cross Sample Comparison: Attorneys' Fees as a Percentage of Settlement

	Benchmark Sample	Competitive Bidding Sample
Upper Bound	33.3%	19.2%
Lower Bound	7%	5.7%
Mean	28.5%	10.8%
Median	30%	8.2%
n	31	7

Using this comparison it becomes clear, even with the small sample, that competitive bidding can result in serious savings for the class members in terms of fees. This discussion of fees and increasing the recovery to class members may seem like penny-pinching, but this does have serious ramifications for the future of litigation. The transaction costs of conducting litigation can be astronomical, especially as compared to other forms of wealth distribution. Most of these costs are a result of attorneys' fees. Since the ultimate goal of litigation is to make the plaintiffs "whole again," it is important for the legal profession and society that attorneys are not artificially overpaid for their work.

3. Excessive Risk Premium

The final hypothesis to test is whether plaintiff's counsels are receiving an excessive risk premium for handling cases described as "ideal." To evaluate risk premiums, the success rates of all three samples, "benchmark," "competitive bidding," and "ideal" were compared. For the "benchmark"

sample the success rate for all cases was 44.2%. In the competitive bidding cases the success rate is currently 100%. For the "ideal" sample, out of the 27 cases, the final disposition was determined for 11 cases. Out of those 11, 10 resulted in settlements or a success rate of 90.9%. Table 2 compares the results for all three samples.

Table 2: Cross Sample Comparison: Success Rates

Sample	Success Rate
Benchmark	44.2%
Competitive Bidding	100%
Ideal	90.9%

If we make one assumption that the percentage attorneys' fees for the "ideal" sample are roughly the same as the "benchmark" sample, the dramatic differences in success rates between the "ideal" and "benchmark" samples indicate plaintiff's counsel in "ideal" cases are receiving a large premium.[119] Since the "ideal" cases have a success rate similar to the "competitive bidding" cases, one should expect to see fees in the 8% to 10% range of competitive bidding. Therefore, although the data is not available, to the extent attorney fees in the "ideal" cases significantly exceed the level of those in the competitive bidding cases, it would indicate an excessive risk premium.

Another important point is that characteristics of the "ideal" cases can be recognized ex ante. This type of ex ante awareness of the risks of these "ideal" cases should reduce the justification for a high risk premium, and also indicates that courts should be able to recognize these types of cases and possibly implement competitive bidding.

Now that the empirical analysis is complete, the final part of this note will examine how competitive bidding is treated under the current form of the PSLRA and the extent

[119] The only available data about percentage attorneys' fees was in one case where lead counsel requested a 33% fee in the notice of settlement.

to which the statute should be changed to allow for more discretionary use of the practice.

IV. COMPETITIVE BIDDING UNDER PSLRA

After examining both the qualitative and quantitative issues involved in competitive bidding, the final issue is the question of whether competitive bidding is permitted under the PSLRA. Except in the most rare circumstances, two recent court of appeals decisions seem to put competitive bidding outside the plain language of the PSLRA statute. Therefore, this note advocates, assuming competitive bidding is generally not permitted under the PSLRA, a change in the text of the statute to provide the judge discretion to implement a competitive bidding process. Such a change would be consistent with the goals of the PSLRA, especially in light of seven years of experience under that regime. In addition, such a change in our understanding of the PSLRA would be consistent with developments in the role of the judge in ensuring the rights and protections of absent class members, especially as embodied in the proposed FRCP Rule 23 changes.

A. Competitive Bidding under the Current PSLRA

There are two major decisions addressing the validity of competitive bidding under the PSLRA. The Third Circuit ruled in *Cendant*[120] that the district court erred in conducting competitive bidding. The Ninth Circuit, in *In re Cavanaugh,* found the trial court committed an error by considering the fee arrangements of the presumptive plaintiff in approving a named plaintiff.[121] While neither decision directly forbids competitive bidding, they both make it clear that these particular courts believe competitive bidding is forbidden under the PSLRA. This section will briefly discuss the holdings in these two cases.

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[120] *In re* Cendant Corp. Litig., 264 F.3d 201 (3d Cir. 2001).

[121] *See In re* Cavanaugh, 2002 U.S. App. LEXIS 18846 (9th Cir. 2002).

1. *In re Cendant*

For background, *Cendant* originated in the District Court of New Jersey.[122] After selecting the CalPERS group as the lead plaintiff, Judge Walls examined courts that had conducted competitive bidding and decided that it was the best manner to decide attorney fees in the current case.[123] He established a seven-step procedure by which the court was to accept bids for the role of lead counsel.[124] These steps included: a discussion of the firm's quality; ability to afford pursuing the litigation; method by which costs would be deducted from the settlement; a fee structure based upon "litigation milepost grids"; a statement of no collusion; a plan to compensate other firms involved in the work; and the court being provided with the right to reject any bids or solicit further ones.[125] In addition, the court provided that the lead counsel, as designated by the lead plaintiff, would have the "right of first refusal" to match the lowest bid.[126]

Ultimately, the counsels selected by the lead plaintiff, Barrack, Rodos & Bacine and Bernstein Litowitz Berger & Grossman LLP, matched the lowest bid from the competitive bidding process.[127] The fee arrangement established created a stepladder approach where at different stages of the

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[122] *See In re* Cendant Corp. Litig., 182 F.R.D. 144 (D.N.J. 1998).

[123] *Id.* at 150 ("These courts have recognized that the most effective way to establish reasonable attorney fees is through marketplace (which this Court terms, adversarial) competition. This Court shares their resolve. Its rationale is simple and flows from the tradition of the profession.") (citing *In re* Oracle Sec. Litig., 131 F.R.D. 688 (N.D. Cal. 1990); *In re* Amino Acid Lysine Antitrust Litig., 918 F. Supp. 1190 (N.D. Ill. 1996); and Raftery v. Mercury Finance Co., 1997 WL 529553 (N.D. Ill. Aug. 15, 1997)).

[124] *Id.* at 151.

[125] *Id.*

[126] *Id.* ("[T]hat person [lead plaintiff's designated counsel], if otherwise qualified, will have the opportunity to agree to the terms of what the Court has found to be the lowest qualified bids."). In order to get more bids in future auctions it is important to eliminate the right of first refusal for selected counsel.

[127] *See In re* Cendant Corp. Litig., 264 F.3d 201, 225 (3d Cir. 2001).

litigation the percentage of recovery would go down as the level of settlement increased.[128]

On December 7, 1999, Cendant agreed to a settlement for the unprecedented value of $2.85 billion.[129] From the fee arrangement established by the auction, the lead counsels were awarded $262 million in fees.[130] The irony is that the fee arrangement between lead plaintiff and chosen counsel before the competitive bidding process would have resulted in attorneys' fees totaling only $187 million, or $75 million less than the fees under competitive bidding.[131] The reason for the difference is that the previous fee arrangement contained a ceiling on attorney fees, while the fee structure from competitive bidding did not.[132] Therefore, while at a lower settlement value, the competitive bidding fee structure would have resulted in lower attorneys' fees; the enormity of this settlement flipped that result. On appeal, class members objected to the fee arrangement, asking the court to negate the competitive bidding procedure, and award attorneys' fees based upon the originally negotiated fee between lead plaintiff and counsel.[133]

From that procedural history, the Third Circuit was asked to rule on the applicability of the competitive bidding procedure implemented by Judge Walls.[134] The Third Circuit held that by the text, and the congressional intent of the PSLRA, a competitive bidding process was not allowed under the circumstances in which it was administered in this case.[135]

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[128] *Id.* at 225, n.4.

[129] *Id.* at 226. *See also* http://securities.stanford.edu/Settlements /largest_post_reform_act.html (*Cendant* settlement largest since passage of PSLRA. Second largest was *Bank of America* for $490 million or $3.037 billion less than *Cendant*).

[130] *Id.* at 229.

[131] *Id.* at 299, n 9.

[132] *Id.*

[133] *Id.* at 229.

[134] *Id.* at 218.

[135] *Id.* at 279-280 ("For the foregoing reasons, we hold that the District Court abused its discretion by conducting an auction because its decision

The court based its decision on two prongs: the text of the PSRLA and the congressional intent embodied in the PSLRA.[136] For his textual argument, Judge Becker focused on the operative language of the PSLRA that implicates lead counsel selection: "Selection of lead counsel. The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class."[137] Taking the plain meaning of the language in the statute, Judge Becker found that the statute clearly gives the power of counsel selection to the lead plaintiff.[138] If the court conducts competitive bidding, the power to select counsel will have been shifted from the lead plaintiff to the court, which is in direct contradiction to the text of PSLRA.[139] While this would be the standard application of PSLRA in most cases of lead counsel selection, Judge Becker does allow for the court to take a more active role in selection of lead counsel if the lead plaintiff cannot adequately select counsel.[140] The Third Circuit has left the door open for continued experimentation with competitive bidding, but only under the most rare circumstances, e.g., if an adequate named plaintiff is not found, which seems unlikely.

According to the Third Circuit, this plain meaning reading of the text is further supported in light of the structure of the entire statute.[141] The PSLRA contains a detailed description of the selection of the lead plaintiff, but the only power vested in the lead plaintiff is the right to

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to do so was founded upon an erroneous understanding of the legal standards undergirding the propriety of conducting an auction under the PSLRA.").

[136] *Id.* at 273.

[137] 15 U.S.C. §78u-4(a)(3)(B)(v) (2001).

[138] *See Cendant*, 264 F.3d at 273.

[139] *Id.*

[140] *Id.* at 277. This note seeks to strengthen the court's scrutiny of the adequacy of lead plaintiff's selection of counsel as a means for the court to conduct competitive bidding under the "ideal" case scenario, *supra* Part I.

[141] *Id.* at 273 ("This conclusion gains support when we examine the overall structure of the PSLRA's lead plaintiff section.").

select and retain counsel.[142] It would be an odd result, argues Judge Becker, if the process of assigning lead plaintiff could be made meaningless by the actions of the court in implementing competitive bidding.[143]

On the second prong of its analysis, the Third Circuit further supports its position by appealing to the congressional intent of the statute, as discovered through both the legislative history and the modeling of the statute on a law review article by Weiss and Beckerman.[144] The intent of the PSLRA, in this provision, is to reduce the agency costs associated with securities class actions by having institutional investors with the largest financial stake in the suit serve as lead plaintiff.[145] Congress believed, as did Weiss and Beckerman, that the institutional investors would be able to effectively monitor the lead counsel and ensure that the interests of the class are fully represented.[146]

Applying this congressional intent to the case, the Third Circuit surmised that the imposition of competitive bidding interrupts the relationship between the lead plaintiff and

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[142] *Id.*; *see also* 15 U.S.C. § 78u-4(a)(3)(A)-(B) (2001). The statute lays out a detailed process for the determination of the lead plaintiff, but the operative language is that the individual or institution with the "largest financial interest in the relief sought by the class" has a presumption as the most adequate plaintiff. § 78u-4(a)(3)(B)(iii)(I)(bb).

[143] *Id.* ("If those powers are seriously limited, it would seem odd for Congress to have established such specific means for choosing the lead plaintiff.").

[144] *Id.* (citing Weiss & Beckerman, *supra* note 17, at 2062).

[145] *Id.*

[146] *Id.* at 273-74 (citing Weiss & Beckerman, *supra* note 17, at 2105-09). ("The entire thrust of Weiss and Beckerman's argument was that large investors would do a better job at counsel selection, retention, and monitoring than judges have traditionally done, and their proposal sought to encourage such investors to serve as lead plaintiff for that purpose."); also citing H.R. Conf. Rep. No. 104-369, at 34 (1995); and S. Rep. No. 104-98, at 11 (1995) ("Both the Conference Committee Report and the Senate Report state that the purpose of the legislation was to encourage institutional investors to serve as lead plaintiff.")).

counsel, and thereby undermines the ability and incentive of the lead plaintiff to monitor the lead counsel.[147]

2. *In re Cavanaugh*

The other circuit to consider the appointment of lead counsel under the PSLRA was the Ninth Circuit. While the Third Circuit decision directly implicated competitive bidding, the Ninth Circuit in *Cavanaugh* was asked on a Petition for Writ of Mandamus by a group of investors to be appointed as lead plaintiff. The court ruled in favor of the petitioners, holding that the district court, Judge Walker, had erred in considering the fee arrangements of each prospective lead plaintiff prior to selecting one.

The argument cited by the Ninth Circuit was very similar to that in *Cendant,* examining both the text and intent of the PSLRA. In particular, the court took issue with Judge Walker's use of the typicality and adequacy prerequisites of Rule 23(a) to insert consideration of the fee arrangements negotiated by the lead plaintiffs.[148] The Ninth Circuit found that the PSLRA did not give the court latitude to examine the fee arrangements negotiated by lead plaintiff.[149] While the Ninth Circuit decision did not directly implicate the competitive bidding process since the court did not conduct the auction, it did use the PSLRA to conclude that Judge Walker had incorrectly considered the fee arrangements of the plaintiffs in selecting the lead plaintiff.

B. Amendments of Statutory Text

While it appears that competitive bidding is forbidden on the text as it stands, an amendment to the PSLRA would

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[147] *Id.* at 273 ("This goal [encouraging institutional investors to serve as lead plaintiff], would be significantly undermined were we to interpret the Reform Act as permitting courts to take decisions involving counsel selection and retention away from the lead plaintiff by ordering an auction.").

[148] *See In re* Cavanaugh, 2002 U.S. App. Lexis 18846 at *20 (9th Cir. 2002).

[149] *Id.* at *22.

reopen competitive bidding to the area of securities class actions. The proposed amendment should be made to 15 U.S.C. §78u-4(a)(3)(B)(v): "Subject to the approval of the court, the Named Plaintiff ~~shall~~ *may presumptively* select and retain class counsel." The addition of the terms "may presumptively" in the place of "shall" should be sufficient to give the court discretion to implement a competitive bidding process if circumstances deem it necessary. In most instances the court will approve the named plaintiff's selected counsel, but in cases that share the characteristics of those called "ideal," it is best to give the courts the discretion to craft an alternative arrangement.

Such a change is consistent with the congressional intent of the PSLRA, especially when considering the reality of life under the PSLRA for the past seven years. In addition, such a change is consistent with the developments in the FRCP that give the judge greater authority in selecting class counsel.[150]

First, a change to the text of the PSLRA is consistent with the goals of the PSLRA, especially in light of seven years of experience with the PSLRA. A significant goal of the PSLRA was to encourage institutional investors to play a larger role in the litigation by creating the presumption that the plaintiff with the largest financial stake is presumptively the lead plaintiff.[151] If this presumption is constantly refuted by the implementation of competitive bidding, institutional investors may become weary of stepping forward as lead plaintiff.[152] However, competitive bidding does not undermine this congressional intention, and such an amendment to the current statute would remain consistent with the ultimate goals of the PSLRA as passed in 1995. While the court may scrutinize the arm's length nature of the fee arrangement between the lead plaintiff and counsel

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[150] This refers to the proposed FRCP Rule 23(h).

[151] *See Cendant*, 264 F.3d at 273, citing legislative history, H.R. Conf. Rep No. 104-369, at 34 (1995); S. Rep. No. 104-98, at 11 (1995) and law review model for PSLRA, Weiss & Beckerman, *supra* note 17, at 2053.

[152] *Id.*

in "ideal" cases, that does not mean the lead plaintiff must be removed if competitive bidding is conducted.[153] Ultimately, someone must serve as lead plaintiff, even if the court conducts competitive bidding. A process of competitive bidding simply appoints the class counsel without necessarily changing the lead plaintiff.[154] Under most methods of conducting competitive bidding, the court has first named the lead plaintiff.[155] The institutional investors will still have the opportunity to aggressively monitor the activity of lead counsel. These institutional investors should still have the same financial incentives to actively monitor counsel as envisioned by the Congress.

Besides seeking institutional investors to monitor lead counsel, another objective of PSLRA is to curb the excesses of attorney-led litigation that are harmful to class members.[156] If one reads this as the overall objective of the statute, the use of the institutional investors becomes one tool sought by Congress to curb this general evil of excessive attorney-driven litigation that is harmful to class members. If the institutional investor selects counsel, this will shift the process more towards "client-driven" litigation and away from "attorney-driven" litigation.[157] But what if in scrutinizing that selection, the court comes to the conclusion the lead plaintiff is being brought along by his/her "selected" lead counsel?[158] Wouldn't deference to this selection undermine this congressional goal of shifting the focus of litigation? If a judge recognizes this reality within their

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[153] *Id.* (Lead plaintiff does not come "inextricably" tied to its counsel).

[154] *Id.*

[155] Hooper & Leary, *supra* note 31, at 26. (Nine out of twelve courts have first determined the lead plaintiff prior to conducting a competitive bidding process.).

[156] *See* John Coffee, Jr., *supra* note 113, at col. 1 ("The legislative history of PSLRA makes plain that Congress wanted to replace "lawyer-driven" litigation with "client-driven" litigation.").

[157] *Id.*

[158] *See* Statement of Judge Walker, *supra* note 15, at 13 ("Indeed, if truth be told, most class representatives are selected by the lawyers rather than the other way around.").

case, one option is to limit the harms of "attorney-driven" litigation by conducting a competitive bidding selection process.

To further effectuate Congress' goal of limiting "attorney-driven" litigation, the courts cannot shield themselves from the reality as to the degree of lead plaintiff's monitoring of lead counsel. In the seven years of the PSLRA it has been speculated that there hasn't been a significant increase in the activity of institutional investors.[159] Judge Becker contemplates that the lead plaintiff, as envisioned under the PSLRA, is "a sophisticated investor who has suffered sizeable losses and can be counted on to serve the interests of the class in an aggressive manner."[160] Therefore, what is the court to do if it does not find the lead plaintiff serving that role? Should it continue the strong deference advocated by the Third Circuit, or should the court, as argued here, take a more active role? This note argues that given the realities of inattentive plaintiffs, the judge must be able to step in and possibly conduct a competitive bidding process.

There are many reasons to expect to see inattentive institutional investor plaintiffs in the future as well. An examination of the incentives at play on the decisions of the lead plaintiff to aggressively negotiate with lead counsel, it can be shown why lead plaintiffs may not aggressively negotiate.[161] Any benefit derived from aggressive negotiating

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[159] *See* Joseph A. Grundfest, "More Questions Than Answers And a Friendly Wager: Observations of the Third Circuit Task Force Report on the Selection of Class Counsel," 74 TEMP. L. REV. 821, 825 (2001) (As the lead investigator for the Stanford Class Action Clearinghouse, Prof. Grundfest believes less than 10% of the lead plaintiffs contact more than one law firm or engage in activity selecting lead counsel that would satisfy "due diligence.")

[160] *In re* Cendant Corp. Litig., 264 F.3d 201, 277 (3d Cir. 2001).

[161] *See* Martin & Metcalf, *supra* note 26, at 1381 ("An institutional investor, like any other investor, must decide whether it is worthwhile to serve as lead plaintiff, probably by engaging in an ordinary cost/benefits analysis. Many institutional investors, however, may not yet realize the enormous benefits, both systemic and direct, that increased participation in securities litigation may bring, and thus current perceptions regarding the value of such participation may need to be reexamined.").

with lead counsel will only result in a proportional benefit to the lead plaintiff, although they bear all the costs of those negotiations. In effect, all other class members would be free riding off of the effort of the institutional investors. Only when the individual stakes of the individually named plaintiff are sufficiently high can we expect to see aggressive monitoring.

A related incentive at play on the institutional investors aggressiveness in monitoring is the relative size of the litigation claim vis-à-vis the total value of the lead plaintiff's entire portfolio. Due to the size of the institutional investors, their stake in the proceeding, which may be the largest of all the plaintiffs, may actually be a small percentage of their total assets or worth. Therefore, the lead plaintiff may still not have an incentive to aggressively monitor the suit since the value of the suit is small in relation to the rest of the institutional investor's total portfolio. Assuming the institutional investor is a rational actor they may decide not to negotiate aggressively because they realize only a portion of the gained benefit, and the suit's total recovery may be small compared to their other financial interests.

A second concern with the activity of the lead plaintiff is the rise of "pay to play" client recruitment by lead counsel.[162] This activity is similar to that which the PSLRA sought to eliminate in the first place by doing away with any "first to file" or "private ordering" process of lead counsel selection. The court must be vigilant for this type of activity, not only to insure that the class members are not being forced to bear the costs of this activity through higher fees, but for the types of incentives this activity may have for the aggressiveness with which the lead plaintiff litigates the case.

These concerns with the activity of the lead plaintiffs should provide the courts with an incentive to more carefully analyze the counsel selection and fee arrangements of the lead plaintiff in order to insure the adequacy of representation. From that, the courts should look to

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[162] *See* Fisch, *supra* note 21, at 79.

competitive bidding as a viable alternative that can potentially cure some of these harms while best protecting the interests of absent class members.

The ability of competitive bidding to address some of these problems was shown above in the empirical analysis.[163] Competitive bidding can create incentives for lead counsel, through the ex ante fee structure, that should compensate for inattentive lead plaintiffs. Competitive bidding is likely to loosen the control that a few law firms have on the market for legal services. It also reduces the benefits of engaging in the corrupt "pay to play" activities. If the position of lead counsel is available to the best counsel by bidding, as measured by a variety of characteristics, the ability to "lock-in" an institutional investor through political contributions and other practices does not guarantee the position of lead counsel, and thus reduces the incentives and payoffs to engage in this activity.

A final justification for amending the PSLRA is that it is consistent with a trend in the proposed FRCP that gives the judge greater discretion in fashioning a class action.[164] Specifically the proposed amendment to Rule 23(g)(1)(C) provides guidance to the court in assigning class action counsel. Under the new Rule 23(g)(1)(C), the court is asked to make a judgment about the appointment of class counsel by considering the quality of representation using four factors: work done by counsel in developing the claim; counsel's experience; counsel's knowledge of the applicable law; and resources of the counsel to litigate fully.[165] Additionally, the rule asks the court to consider "any other matter pertinent to the counsel's ability to fairly and adequately represent the interests of the class."[166] The only significant criterion not put into Rule 23(g)(1)(C) is a consideration of the attorney fee arrangements by the

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[163] *See supra*, Section III.

[164] *See* Report of the Civil Rules Advisory Committee, *available at* http://www.uscourts.gov/rules/jc09-2002/CVRulesJC.pdf.

[165] Proposed Amendment FRCP 23(g)(1)(C).

[166] *Id.*

prospective class counsels. However, the Committee Notes do state that the court may take attorney fee arrangements into account or inquire into it of prospective counsel.[167]

The important feature of these proposed amendments from the perspective of competitive bidding is that they require a judge to do much of what is needed to conduct an auction for class counsel. The current Rule 23 does not have a clause concerning the appointment of counsel, so the proposed amendments are a significant change in the stated responsibility of judges to protect absent class members.[168] This test leaves out only the consideration of fees before having essentially a rule-mandated auction.[169]

While the comments do also specifically disclaim the use of competitive bidding, the functional effect of the rule is to give the courts a great amount of power to determine the quality of lead counsel in making a selection, akin to what occurs within the competitive bidding process.[170] However, the real takeaway from the Proposed Amendments to Rule 23 is that the current trend in thinking is moving towards giving judges the discretion in managing class actions. Since a movement towards some type of competitive bidding or increased judicial discretion in the selection of counsel is occurring in class actions in general, now is not the time to

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[167] Committee Note of Proposed Amendment FRCP 23(g)(1)(C).

[168] *See* Conference Comments on proposed Amendments to FRCP 23(g) ("[Proposed Rule 23(g)] underscores. . .the fiduciary obligation of the court to make sure that counsel discharges that duty.").

[169] *See* Comment of Gregory Joseph in Proposed Rule: "We are aware that the proposed amendment to Rule 23(g) is consistent with the use of auctions, and express no view on the auction mechanism but do agree that Rule 23 should be broad enough to encompass it." *See Proposed Rule,* at http://www.uscourts.gov/rules/jc09-2002/CVRulesJC.pdf, at 203. (Gregory Joseph was the chairman of the Third Circuit Task Force Report on the selection of class counsel under the PSLRA.)

[170] *See* Comments of Peter Ausili, E.D.N.Y. Comm. On Civil Lit., at 203-218 ("The Committee was concerned about utilizing a bidding process and putting the judge in that particular role. It felt that it was early and unwise at this time for the court to adopt essentially a competitive bidding procedure for selection of the client's counsel.").

close the door on competitive bidding in securities class actions.

V. CONCLUSION

In both the courts and the law journals, there has been a lot of negative press about competitive bidding in securities class actions. This note has attempted to address some of those criticisms, and to counter them with some of the benefits of competitive bidding for lead counsel. Competitive bidding has the potential to replicate the market for legal services, open the selection process, reduce excessive risk premiums, and reduce agency costs by creating ex ante incentive alignments between class and counsel.

It does appear that competitive bidding is generally not allowed under the current state of the PSLRA. Therefore, the PSLRA should be amended to allow for the possibility of competitive bidding on the judge's discretion. After seven years with the PSLRA, it is clear that the goal of aggressive institutional investor monitoring is not found in every case. Finally, recent trends, embodied in the Proposed Amendments to Rule 23(g), indicate a greater discretion and willingness on the part of judges to select the appropriate class counsel. This trend should not be cut off in securities class actions, an area of class actions where competitive bidding has the most experience and the greatest potential for benefit.

The market economy is founded upon the principle that competition is good. It is a valuable incentive for wealth maximization in our society. This principle should apply as well to the process of selecting lead counsel in securities class actions. Taking a realistic perspective on the current state of affairs in securities class actions and current trends in the discretionary role of judges to protect absent class members, the PSLRA should be amended to allow the use of competitive bidding in particular circumstances.

APPENDIX A: Benchmark Sample

Company	Date of Complaint	Attorney	Location	Disposition	Settlement	Attorneys' Fees	Percentage of Settlement	Expenses
3Com Corp. 98	2/9/98	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$259,000,000	$64,750,000	25%	N/A
3Com Corp. 99	5/11/99	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
ADAC Laboratories	12/29/98	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$20,000,000	$6,000,000	30%	$324,195
Adaptive Broadband Corp.	3/19/01	Abbey Gardy & Squiteri LLP	N.D.C.A.	Incomplete				
Ancor Comm.	7/24/97	Barrack, Rodos & Bacine	Minn.	Win	$1,650,000	N/A	N/A	N/A
Ann Taylor Stores	4/24/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	S.D.N.Y.	Win	$3,000,000	$1,000,000	30%	$263,478
Apple South	9/22/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	M.D.G.A.	Dismissed				
Ardent Software	12/24/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
Aurora Foods, Inc.	2/22/00	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$36,000,000	$9,000,000	25%	$650,000
Autodesk	*3/21/00*	*Milberg, Weiss, Bershad, Hynes & Lerach LLP*	N.D.C.A.	Dismissed				
Autodesk, Inc (96)	6/13/96	Bernstein Litowitz Berger & Grossmann LLP	Mass.	Dismissed				
Autodesk, Inc (97)	4/29/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
Avanti Corp.	5/30/97	Berger & Montague, P.C.	N.D.C.A.	Unsure				
Baan Company N.V.	10/16/98	Milberg, Weiss, Bershad, Hynes & Lerach LLP	D.C.D.C.	Dismissed				
Bay Networks	1/1/97	Berman, DeValerio & Pease, LLP	N.D.C.A.	Dismissed				
Boeing	10/31/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	W.D.W.A.	Win	$92,500,000	$27,750,000	30%	
Broadvision Inc.	4/17/01	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
Buenos Aires Embot.	9/30/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	S.D.N.Y.	Win	N/A	N/A	33.3%	$211,505
CBT Group PLC	10/2/98	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
Cellstar Corporation	5/14/96	Grant & Eisenhofer	N.D.T.X.	Win	N/A	$2,617,500	N/A	$285,048
Centennial Tech.	2/11/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	Mass.	Dismissed				
Centocor	1/16/98	Abbey Gardy & Squiteri LLP	E.D.P.A.	Unsure				
Cephalon	10/18/96	Berger & Montague, P.C.	E.D.P.A.	Win	$17,000,000	$5,100,000	30%	
Chantal Pharmaceutical	2/7/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	C.D.C.A.	Unsure				
Chemical Invest. Services	*11/6/96*	*Kirby, McInerney & Squire LLP*	S.D.N.Y.	Dismissed				
Cholestech	2/5/99	Lionel Glancy	N.D.C.A.	Win	$3,000,000	$900,000	30%	$102,015
Clarent Corp.	9/5/01	Bernstein Litowitz Berger & Grossmann LLP	N.D.C.A.	Incomplete				
Coeur D'Alene Mines	7/2/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	D.C.O.	Win	$7,000,000 to $13,000,000	$2,100,000 to $3,900,000	30%	$750,000
CommTouch Software	5/17/01	Glancy & Binkow	N.D.C.A.	Incomplete				
Computron Software	4/25/96	Bernstein Litowitz Berger & Grossmann LLP	D.N.J.	Win	$15,000,000	$3,750,000	25%	$350,000
Coram Healthcare Corp.	11/8/00	Unknown	D.N.J.	Incomplete				
Critical Path, Inc.	2/2/01	Berman, DeValerio & Pease, LLP	N.D.C.A.	Win	$17,500,000			
Cylink	11/6/98	Innelli & Molder	N.D.C.A.	Incomplete				
Diamond Multimedia	7/24/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$15,000,000	$4,500,000	30%	$1,400,000
Digi International	1/3/97	Lockridge Grindal Nauen	D.Minn.	Dismissed				
Electr. For Imgaing	12/31/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
Equipment Leasing Co.	12/23/97	Innelli & Molder	E.D.P.A.	Win	N/A			
Ernst Home Center	7/16/96	Hagens Berman, P.S.	W.D. Wash	Dismissed				
Evolving Systems	6/22/98	Dyer, Donnelly	D.C.O.	Win	N/A	N/A	N/A	N/A
Filenet Corp.	4/1/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	C.D.C.A.	Dismissed				
First USA Paymentech	10/10/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.T.X.	Dismissed				
Fleming Companies	4/4/96	Bernstein Litowitz Berger & Grossmann LLP	W.D.O.H.	Dismissed				
Fluor Corporation	9/12/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	C.D.C.A.	Dismissed				
Fore Systems	7/29/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	W.D.P.A.	Unsure				
Foxmeyer Health	8/12/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.T.X.	Unsure				
Fritz Companies, Inc.	7/31/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
FTP Software	3/14/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	D.Mass.	Dismissed				
Gaming Lottery	6/14/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	S.D.N.Y.	*Unsure*				
Glenayre Tech.	11/1/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	S.D.N.Y.	Dismissed				
Green Tree Financial	1/9/98	Milberg, Weiss, Bershad, Hynes & Lerach LLP	D.Minn.	Dismissed				
H.J. Meyers, Inc.	9/12/97	Shalov Stone & Bonner	S.D.N.Y.	Win	$5,000,000	$800,000 + stocks	N/A	N/A

APPENDIX A: Benchmark Sample

Company	Date of Complaint	Attorney	Location	Disposition	Settlement	Attorneys' Fees	Percentage of Settlement	Expenses
Harmonic, Inc.	6/29/00	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Incomplete				
Health Management Sys.	3/17/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	S.D.N.Y.	Dismissed				
HorizonCMS Healthcare	4/2/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	D.N.M.	Win	$21,000,000	$5,250,000	25%	N/A
Identix	10/8/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$3,000,000	$900,000	30%	$74,786
IMP	10/1/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$9,500,000	$2,850,000	30%	$371,577
Indus International Inc.	2/3/00	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$4,300,000	$1,075,000	25%	$109, 634
Informix Corporation	4/11/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$136,500,000	N/A	N/A	N/A
Insignia Solutions	3/24/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$8,000,000	$2,400,000	30%	$256,199
Int. Automated Systems	7/3/96	Parry Murray & Ward	D.Utah	Dismissed				
Itron	5/23/98	Berman, DeValerio & Pease, LLP	E.D.Wash	Unsure				
Ivax Corporation	7/3/96	Goodkind Labaton Rudoff	S.D.F.L.	Dismissed				
LCI International	4/3/98	Cohen Milstein Hausfeld & Toll	E.D.V.A.	Dismissed				
Learning Tree International	8/6/98	Milberg, Weiss, Bershad, Hynes & Lerach LLP	C.D.C.A.	Unsure				
Legato Systems Inc.	12/2/00	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
Loudcloud	10/19/01	Unknown	N.D.C.A.	Incomplete				
Lumisys	7/10/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$1,600,000	$480,000	30%	$325,000
Macromedia	9/25/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$48,000,000	$14,400,000	30%	$2,550,000
Madge Networks	8/13/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
Material Sciences Corp.	4/10/97	Stull, Stull & Brody	N.D.I.L	Unsure				
McKesson HBOC	4/28/99	Bernstein Litowitz Berger & Grossmann LLP	N.D.C.A.	Dismissed				
Micrion Corporation	8/2/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	D.Mass.	Dismissed				
Midcom Communications	4/19/96	Rohan Goldfarb Rafel & Shapiro	W.D.W.A.	Win	N/A	N/A	N/A	N/A
Miller Industries	9/19/97	Berger & Montague	N.D.G.A.	Dismissed				
Netcor Puritan Bennett	4/14/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
NetMange	1/10/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
Network Associates	12/29/00	Bernstein Litowitz Berger & Grossmann LLP	N.D.C.A.	Dismissed				
Network Associates	4/7/99	Lieff, Cabraser, Heimann &	N.D.C.A.	Win	$30,000,000	$2,100,000	7%	$2,000,000
NewEdge Corp	11/13/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	D.Mass.	Dismissed				
Northern Telecom	2/28/97	Berman, DeValerio & Pease, LLP	N.D.C.A.	Dismissed				
Northrop Grumman	7/31/98	Milberg, Weiss, Bershad, Hynes & Lerach LLP	C.D.C.A.	Dismissed				
NTN Communications	6/11/97	Krause and Kalfayan	S.D.C.A.	Unsure				
Oak Technology	9/4/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
Olsten Corporation	4/17/97	Wechsler Harwood Halebian & Feffer	E.D.N.Y	Unsure				
Olympic Financial	3/4/97	Heins, Mills & Olsen	D.Minn.	Win	$6,125,000	$2,021,250	33.3%	$515,138
Oracle Corporation	3/13/01	Unknown	N.D.C.A.	Incomplete				
Orthologic Corporation	6/24/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	D.A.Z	Unsure				
Oxford Health Plans	11/4/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	D.Conn.	Incomplete				
Pacific Gateway Exchange	4/7/00	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Incomplete				
PacifiCare Health Systems	12/1/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	C.D.C.A.	Dismissed				
Paracelsus Healthcare	10/15/96	Kilgore & Kilgore	S.D.T.X	Dismissed				
Paradigm Technology	5/19/98	Weiss & Yourman	N.D.C.A.	Unsure				
PeopleSoft	1/29/99	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$15,000,000	$3,750,000	25%	$950,000
Proxima Corporation	8/16/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	S.D.C.A.	Win	$6,500,000	$1,950,000	30%	$338,380
Pyramid Breweries	6/14/96	Krause and Kalfayan	S.D.C.A.	Dismissed				
Quantum Corporation	8/30/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
Rambus, Inc.	8/14/01	Bernstein Litowitz Berger & Grossmann LLP	N.D.C.A.	Incomplete				
Raster Graphics	3/2/98	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$4,500,000	$1,125,000	25%	$117, 019
Rational Software	10/10/97	Wechsler Harwood Halebian & Feffer	N.D.C.A.	Unsure				
Read-Rite Corporation	1/3/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
Red Brick Systems	3/25/98	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
Scholastic Corporation	4/7/97	Bernstein Litowitz Berger & Grossmann LLP	S.D.N.Y.	Dismissed				

APPENDIX A: Benchmark Sample

Company	Date of Complaint	Attorney	Location	Disposition	Settlement	Attorneys' Fees	Percentage of Settlement	Expenses
Semiconductor Materials	?	Rifkin, Greenfield & Rifkin	E.D.P.A.	Dismissed				
Shiva Corporation	5/21/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	D.Mass.	Win	$4,350,000	$1,448,550	33.30%	$350,000
SI Management L.P.	5/1/97	The Mills Law Firm	N.D.C.A.	Win	N/A	N/A	N/A	N/A
Silicon Graphics	1/29/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$12,000,000	$3,600,000	30%	$430,000
Smart Modular Technologies	7/1/98	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Unsure				
Splash Technology Holding	1/13/99	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
Storm Technology	12/12/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$2,750,000	$825,000	30%	$270,000
Stratosphere Corporation	8/5/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	D.N.V.	Win	$9,000,000	$2,997,000	33.3%	$2,100,000
Summit Medical Systems	3/10/97	Larkin Hoffman Daly & Lindgren	D. Minn.	Win	N/A	N/A	N/A	N/A
Symantec	1/7/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	N/A	N/A	N/A	N/A
SyQuest Technology	4/2/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
TCSI Corporation	9/24/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	N/A	N/A	25%	N/A
Transmeta	6/25/01	Lieff, Cabraser, Heimann &	N.D.C.A.	Incomplete				
TRO Learning	12/15/97	Miller, Faucher & Cafferty LLP	N.D.I.L	Dismissed				
Turnstone Systems, Inc.	3/28/01	Bernstein Litowitz Berger & Grossmann LLP	N.D.C.A.	Incomplete				
VanStar	1/21/98	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$5,000,000	$1,500,000	30%	$500,000
Vantive Corp.	7/6/99	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Dismissed				
Versant Object Technology	1/26/98	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Incomplete				
Websecure	3/26/97	Shapiro, Grace & Haber	D.Mass.	Unsure				
Wellcare Mgmt. Group	3/29/96	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.N.Y.	Win	$2,500,000	$825,000	33.30%	$325,000
Wheatley Ventures	8/15/96	Matakoff, Doyle & Finberg	N.D.C.A.	Dismissed				
Yes! Entertainment	4/18/97	Milberg, Weiss, Bershad, Hynes & Lerach LLP	N.D.C.A.	Win	$2,250,000	$675,000	30%	$200,000
Zilog	1/23/98	Stull, Stull & Brody	N.D.C.A.	Dismissed				

APPENDIX B: Competitive Bidding Sample

	Case	Attorney	Disposition	Settlement	Fees	Fee Percentage	Expenses
Pre-PSRLA	In Re Oracle	Lowey, Dannenberg, Bemporad, Brachtl & Selsinger	Win	$25,000,000	$4,800,000	19.2%	$825,000
	In re Wells Fargo	Leiff, Cabaser, & Heimann	Win	$23,713,709	$2,873,150	12.1%	$208,605
	In Re California Micro Devices	Hogan & Hartson	Win	$26,000,000	$4,028,345	15.5%	
Post-PSLRA	Cylink Corp	Innelli & Molder	Incomplete				
	Quintus Sec.	Weiss & Yourman	Incomplete				
	Amino Acid Antitrust	Kohn, Swift & Graf	Win	$49,000,000	$3,500,000	7.1%	Incl. in Fees
	Bank One Shareholders	Wechsler Harwood Halebian Feffer LLP	Win	$45,000,000	$3,500,000	7.8%	Incl. in Fees
	Comdisco	Wolf Haldenstein Adler Freeman & Herz	Incomplete				
	Network Associates	Leif Cabraser Heimann & Bernstein	Win	$30,000,000	$2,080,000	6.9%	$360,813
	Commtouch	Unknown	Incomplete				
	Cendant	Bernstein, Litowtiz Berger & Grossman LLP	Win	$3,186,500,000	$262,468,857	8.2%	$14,623,806
	Windmere-Durable Holding	Milberg Weiss Bershad Hynes & Lerach LLP	Incomplete				
	Lucent Technology I	Milberg Weiss Bershad Hynes & Lerach LLP	Incomplete				
	Lucent Technology II	Bernstein, Litowtiz Berger & Grossman LLP	Incomplete				
	Auction House Antitrust	Boise Shillers	Win	$512,000,000	$26,750,000	5.2%	Incl. in Fees
	Cendant PRIDES	Kirby, McInery & Squire	Incomplete	$341,480,861	$19,329,463	5.7%	$2,367,493

APPENDIX C: Ideal Sample

Company	Date of Article	Date of Filing	Disposition
Critical Path Inc	2/6/2002*	2/1/02	Ongoing
PNC Financial	1/30/02	2/1/02	Ongoing
TYCO	1/3/02	2/5/02	Ongoing
Credit Suisse First Boston	11/30/01	8/3/01	Ongoing
Enron	11/30/01	10/22/01	Ongoing
GenesisIntermedia Inc.	10/9/01	10/18/02	Ongoing
ConAgra Foods	5/25/01	8/10/01	Ongoing
IBP Inc	5/21/2001[1]	2/12/01	Ongoing
Raytheon Co.	5/4/01	6/19/01	Ongoing
Heartland Funds	3/23/01	11/13/00	Ongoing
VA Linux Systems	12/12/00	1/11/01	Ongoing
Bristol-Myers	10/12/00	4/28/00	Ongoing
McKesson HBOC	9/29/00	4/28/99	Win
Microstrategy/PwC	5/24/00	3/20/00	Win
Philip Services	5/3/99	12/19/98	Ongoing
Telxon Corp.	2/22/99	12/11/98	Ongoing
PennCorp Financial Group	8/21/98	8/24/98	Win
CellStar	8/4/98	5/26/99	Win
Columbia HCA Healthcare	4/1/98	4/8/97	Win
DonnKenny Inc.	4/17/97	11/20/96	Win
PressTek Inc.	4/8/97	6/28/96	Win
Micro Warehouse	4/7/97	10/1/96	Win
U.S. Diagnostics	2/4/97	1/30/97	Win
FHP International Corp.	8/16/96	4/2/97	Dismissed
Vista 2000	5/17/96	4/16/96	Win

* Article date indicated completion of the SEC investigation

[1] On 12/29/00 SEC sent letter concerning financial misstatements