

Questions and Issues for Discussion

1. How much in attorneys fees (for plaintiffs and defendants) and other measurable costs are associated with the litigation and settlement of a typical action against a corporate issuer? Who bears these costs? What are the costs of litigating a typical case if it is resolved via a motion to dismiss or by summary judgment?
2. What is the role of insurance in these settlements? What portion of settlements (and the costs associated with the litigation) is funded by insurance carriers? What is the impact on investors of the insurers' role, including the impact of any insurance rate increases?
3. What percentage of identifiable victims of securities fraud file claims and collect their shares of the settlements? How does this percentage vary based on size and type of investor (i.e., small individuals, large institutional investors)? What standards do claims administrators use to determine the eligibility and shares of class members? What methodology do claims administrators use to determine eligible losses -- how do they deal with issues such as multiple transactions, loss causation, etc.? How do these determinations compare to the standards used by the Commission to distribute fair funds? What percentage of "eligible losses" do investors receive in recovery? How do claims administrators deal with unclaimed monies? How much does the claims administration process cost? Can the process of giving notice of settlements and the procedures to submit proof of claims be improved upon so that greater participation in settlements by class members would occur?
4. What is the relative wealth impact of a settlement on (a) claimants who are part of the class and (b) shareholders of the issuer who did not buy or sell during the class period? Research suggests that the announcements of securities class actions often causes a decline in the price of the issuer's stock that reflects the litigation itself rather than any news about the issuer. Is this accurate? If so, what does it say about the relative wealth effects on different types of investors?
5. How often are large diversified investors beneficiaries of a distorted stock price (selling at inflated price or buying at a depressed one) compared to suffering from such distortions? What is the net effect? Is this relevant?
6. In light of the foregoing, how realistic is compensation as a goal in securities fraud class actions? If not, do current standards dealing with reliance and causation make sense?
7. How do the economics of compensation or deterrence change when the defendant is a third-party primary participant? What does this say about the definition of the scope of liability for third parties?

8. How well do securities class actions deter misbehavior, as opposed to the other legal and marketplace penalties that come from the discovery of fraud?
9. Are there reforms that could make private securities litigation more effective at targeting individual wrongdoing? To what extent do insurance, indemnification and asset protection strategies make it difficult to target individuals? Is it common for individual officer or director defendants to be indemnified by their employers when they bear a portion of a settlement? Jack Coffee has suggested higher attorneys fees for individual recoveries as well as board of director reporting on how and why any settlement agreed to by the issuer places sufficient responsibility on the possible wrongdoers. Would these proposals make a useful change? How should responsibility for pursuing individual wrongdoers be apportioned between the Commission and private litigation?
10. Should issuer liability be eliminated entirely absent a showing that the company itself tangibly benefited from the fraud? If so, would there be sufficient incentives to bring private securities litigation? What would be the effect of caps on issuer damage liability? Should there be caps for other potential defendants as well? How do caps interact with the proportionate liability provision of the PSLRA?
11. To what extent are the answers to these questions different when the issuer is buying or selling stock, or it is a third-party (e.g., an investment bank or accounting firm) rather than the issuer who is sued?
12. How well has the PSLRA's "lead plaintiff" provision worked in making securities class actions more effective? Apart from the biggest and highest profile cases, are institutional investors engaging in active monitoring? When attorneys fees are negotiated in advance of the litigation by an institutional lead plaintiff, how does the negotiated fee compare with those commonly determined by a court in the absence of such fees? Are institutional lead plaintiffs obtaining better settlements or lower fee awards? Are they seeking more governance reforms, and if so, are such efforts in the interests of other class members?
13. What has the effect of heightened pleading standards been on the class action process? Are there good cases that are dismissed simply because the bar is set too high? Are there weak cases that too easily survive the motion to dismiss? Should there be interlocutory appeal of denials of motions to dismiss?
14. How can the SEC's fair funds distribution procedure best be reconciled or coordinated with settlements and distributions pursuant to a class action?

15. In either SEC fair funds distributions or class action settlement distributions, can or should smaller investors be given more priority (i.e., relatively greater pro rata shares) than at present? How would such priority be defined?

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