UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| In re GENWORTH FINANCIAL, INC. SECURITIES LITIGATION | : | Master File No. 1:14-cv-02392-AKH |
| | : | CLASS ACTION |
| This Document Relates To: | : | MEMORANDUM IN SUPPORT OF CLASS REPRESENTATIVES' MOTION FOR FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION |
| ALL ACTIONS. | : | |

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**SECONDARY AUTHORITIES**

## I. PRELIMINARY STATEMENT

The Class Representatives, City of Hialeah Employees' Retirement System ("City of Hialeah") and New Bedford Contributory Retirement System ("New Bedford") (collectively, "Class Representatives" or "Lead Plaintiffs") respectfully submit this memorandum of law in support of their motion for final approval of the proposed Settlement reached in the above-captioned litigation and approval of the proposed Plan of Allocation. The Settlement provides a recovery of $20,000,000.00 in cash to resolve this securities class action against Genworth Financial, Inc. ("Genworth" or the "Company") and Michael D. Fraizer ("Fraizer") and Martin P. Klein ("Klein") (collectively, the "Individual Defendants," and, together with Genworth, the "Defendants"). The terms of the Settlement are set forth in the Stipulation of Settlement, dated June 15, 2017 (the "Stipulation"), which was previously filed with the Court. Dkt. No. 152-1.[1]

As set forth below and in the accompanying Joint Declaration,[2] the Settlement is a very good result for the Class and is the result of the Class Representatives' and Class Counsel's comprehensive litigation efforts over the past three years in which they, *inter alia*, vigorously engaged in two rounds of briefing on Defendants' motions to dismiss two amended complaints (successfully opposing Defendant's motion to dismiss the Second Amended Complaint); successfully moved for class certification; engaged in a thorough and extensive class discovery process, which included defending the depositions of the Class Representatives and one of the Class Representatives' investment managers; engaged in a thorough and extensive fact discovery process,

[1] All capitalized terms not defined herein have the same meanings set forth in the Stipulation.

[2] The Court is respectfully referred to the Joint Declaration of Jonathan Gardner and Douglas R. Britton in Support of Class Representatives' Motion for Final Approval of Class Action Settlement and Plan of Allocation and Class Counsel's Motion for an Award of Attorneys' Fees and Payment of Litigation Expenses ("Joint Decl." or "Joint Declaration") for a full discussion of the factual background and procedural history of the Litigation, the risks and obstacles faced if litigation continued, a discussion of the negotiations leading to the Settlement, and the reasons why the Settlement and Plan of Allocation should be approved by the Court.

which included Class Counsel's obtaining and analyzing approximately 2.1 million pages of documents from Defendants, approximately 227,000 pages of documents from non-parties, and taking four merits-based depositions (two of which were in Australia); and engaged in a hard-fought settlement process with experienced defense counsel. As a result of Class Counsel's extensive efforts in the prosecution of this Litigation, the Settlement was reached at a time when the Parties fully understood the strengths and weaknesses of their respective positions.

Class Counsel, who are well-respected and experienced in prosecuting securities class actions, believe that the Settlement represents a very good result for the Class, particularly when compared to the risks that continued litigation might result in a vastly smaller recovery, or no recovery at all. This conclusion is based on, among other things, the immediate and certain recovery obtained for the Class when weighed against the significant risk, expense, and delay presented in continuing the Litigation through further fact discovery; expert discovery; summary judgment; trial; probable post-trial motions and appeals; a detailed analysis of the evidence obtained to date and the strengths and weaknesses of the factual and legal issues presented; the serious disputes between the Parties concerning the merits and damages; and Class Counsel's vast experience in litigating complex securities class actions. Importantly, the Class Representatives, sophisticated institutional investors who were actively involved in the Litigation, fully support the Settlement. *See* Declaration of Robert Williams III in Support of Motion for Final Approval of Class Action Settlement and Application for an Award of Attorneys' Fees and Expenses and Plaintiffs' Expenses Pursuant to 15 U.S.C. §78u-4(a)(4) ("Williams Decl."); Declaration on Behalf of New Bedford in Support of Motion for Final Approval of Class Action Settlement and Award of Attorneys' Fee and Expenses Pursuant to 15 U.S.C. §78u-4(a)(4) ("New Bedford Decl."), filed herewith.

For all the reasons discussed herein and in the Joint Declaration, it is respectfully submitted that the Settlement is not only fair, reasonable and adequate, but is a very good result for the Class that should be approved by the Court. Likewise, the Plan of Allocation, which was developed with the assistance of the Class Representatives' damages expert, provides a fair and equitable method for distribution among eligible Class Members and should also be approved by the Court.

## II. THE NOTICE PROGRAM SATISFIED RULE 23 AND DUE PROCESS

In accordance with the Preliminary Approval Order, to date over 28,000 copies of the Notice of Pendency and of Proposed Class Action Settlement and Motion for Attorneys' Fees and Expenses (the "Notice") have been mailed to potential Class Members and their nominees. *See* Declaration of Carole K. Sylvester Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Sylvester Decl."), ¶¶4-11, filed herewith. The Summary Notice was also published in *The Wall Street Journal* and transmitted over the *Business Wire* on August 22, 2017. *Id.*, ¶14. The Notice, the Claim Form, the Stipulation and its Exhibits, and the Preliminary Approval Order were also posted on a case-specific website identified in the Notice, and Class Counsel have made relevant documents concerning the Settlement available on their firms' websites. *Id.*, ¶13; Joint Decl., ¶65.

The Notice contains a detailed description of the nature and procedural history of the Litigation, as well as the material terms of the Settlement, including, *inter alia*: (i) a description of the claims that will be released in the Settlement; (ii) the manner in which the Net Settlement Fund will be allocated among eligible Class Members; (iii) the process for Class Members to seek exclusion; (iv) the process for Class Members to object to the Settlement, the Plan of Allocation, and/or the fee and expense application; and (v) information about the attorneys' fee and expense request. *See generally*, Sylvester Decl., Ex. A.

Accordingly, the Notice program fully satisfied Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The Notice also satisfied the specific requirements of the Private Securities Litigation Reform Act of 1995 ("PSLRA") and Rule 23(e)(1), which requires that notice must be provided in a "reasonable manner" – *i.e.*, it must "'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.'" *Wal-Mart Stores, Inc. v. VISA U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982)).

## III. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

### A. The Standards for Evaluating Class Action Settlements

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, this Court may approve a class action settlement where it finds the settlement to be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also Wal-Mart Stores,* 396 F.3d at 116. The evaluation of a proposed settlement requires an assessment of both the procedural and substantive fairness of the settlement. *See McReynolds v. Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009).

While the decision to grant or deny approval of a settlement lies within the broad discretion of the trial court, a number of courts have observed a general policy in favor of settling class actions. *See Aponte v. Comprehensive Health Mgmt.*, No. 10 Civ. 4825 (JLC), 2013 WL 1364147, at *2 (S.D.N.Y. Apr. 2, 2013) (noting that "[c]ourts examine procedural and substantive fairness in light of the 'strong judicial policy in favor of settlement[]' of class action suits" and collecting cases);[3] *see also In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("[T]here is

[3] All citations are omitted and emphasis is added, unless otherwise noted.

an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.").

Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that, while a court should not give "rubber stamp approval" to a proposed settlement, it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974); *see also In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007) (in evaluating a settlement, "a court neither substitutes its judgment for that of the parties who negotiated the settlement nor conducts a mini-trial of the merits of the action").

In addition to the presumption of fairness that attaches to a settlement reached as a result of arm's-length negotiations, the Second Circuit has identified nine factors that courts should consider in deciding the substantive fairness of a class action settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

*Grinnell*, 495 F.2d at 463; *see also In re Wachovia Equity Sec. Litig.*, No. 08 Civ. 6171 (RJS), 2012 WL 2774969, at *3-*5 (S.D.N.Y. June 12, 2012). "A court need not find that every factor militates in favor of a finding of fairness, rather a court 'considers the totality of these factors in light of the particular circumstances.'" *Chin v. RCN Corp.*, No. 08 Civ. 7349 (RJS) (KNF), 2010 WL 3958794, at *3 (S.D.N.Y. Sept. 8, 2010). As demonstrated below and in the Joint Declaration, the Settlement meets each of the applicable *Grinnell* factors.

**B. The Settlement Is Procedurally Fair**

A presumption of fairness attaches to a proposed settlement if it is reached by experienced counsel after arm's-length negotiations, and great weight is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation. *See Shapiro v. JPMorgan Chase & Co.*, No. Civ. 11-8831 (CM) (MHD), 2014 WL 1224666, at *7 (S.D.N.Y. Mar. 24, 2014). A court may find the negotiating process is fair where, as here, "the settlement resulted from 'arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability . . . necessary to effective representation of the class's interests.'" *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001); *see also Wachovia Equity*, 2012 WL 2774969, at *3.

This presumption of fairness applies in this case because the Settlement was reached only after arm's-length settlement negotiations between highly experienced and fully-informed counsel. As set forth in the Joint Declaration, the Parties engaged in various telephonic conferences, in person discussions, and emails to discuss possible settlement. Following an in-person settlement meeting on March 21, 2017, the Parties' efforts culminated in an agreement to resolve the Litigation. Joint Decl., ¶59.

Moreover, the recommendation of the Class Representatives, each a sophisticated institutional investor that manages millions in retirement fund assets, also supports the fairness of the Settlement. The Class Representatives took an active role in all aspects of the Litigation, as envisioned by the PSLRA, including extensive efforts in discovery and participation in settlement discussions. *See generally*, Williams Decl.; New Bedford Decl. A settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness.'" *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 0165(CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007). "'Absent fraud or collusion, the

court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement.'" *Id*.

Class Counsel, who have extensive experience prosecuting complex securities class actions and are intimately familiar with the facts of this case, believe that the Settlement is not only fair, reasonable, and adequate, but is a very good result for Class Representatives and the Class. This opinion is entitled to "great weight." *City of Providence v. Aeropostale Inc.*, No. 11 Civ. 7132 (CM) (GWG), 2014 WL 1883494, at *5 (S.D.N.Y. May 9, 2014), *aff'd sub. nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015).

Each of these considerations confirm the reasonableness of the Settlement and that the Settlement is entitled to the presumption of procedural fairness.

### C. The Settlement Satisfies the Second Circuit's Test of Substantive Fairness

#### 1. The Complexity, Expense, and Likely Duration of the Litigation Supports Approval of the Settlement

"This factor captures the probable costs, in both time and money, of continued litigation." *Shapiro*, 2014 WL 1224666, at *8. Securities class actions like this one are by their nature complicated, and district courts in this Circuit have long recognized that "[a]s a general rule, securities class actions are 'notably difficult and notoriously uncertain' to litigate." *In re Facebook Inc. IPO Sec. & Derivative Litig.*, No. MDL 12-2389, 2015 WL 6971424, at *3 (S.D.N.Y. Nov. 9, 2015), *aff'd*, 674 F. App'x 37 (2d Cir. 2016); *In re Bear Stearns Cos.*, 909 F. Supp. 2d 259, 266 (S.D.N.Y. 2012); *see also In re Alloy, Inc., Sec. Litig.*, No. 03 Civ. 1597 (WHP), 2004 WL 2750089, at *2 (S.D.N.Y. Dec. 2, 2004) (approving settlement, noting action involved complex securities fraud issues "that were likely to be litigated aggressively, at substantial expense to all parties"); *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, No. MDL 1500, 2006 WL 903236, at *8 (S.D.N.Y.

Apr. 6, 2006) (due to their "notorious complexity," securities class actions often settle to "circumvent[] the difficulty and uncertainty inherent in long, costly trials"). This case is no exception.

The Class Representatives' claims here raise complex factual issues regarding, among other things, the adequacy of loan reserves, an issue which would have required extensive percipient and expert testimony at trial. *See* Joint Decl., ¶71. The Court previously acknowledged the complexity of loan reserve issues at the preliminary approval hearing: "This case is complex. The concept of adequacy of reserves is one of the most difficult accounting problems there are." Joint Decl., Ex. 1 (July 28, 2017 Fairness Hearing Transcript at 7:16-18). This is in addition to the complicated legal issues also detailed below concerning scienter and loss causation, among other issues, each of which would also require expert testimony at trial. Furthermore, absent this Settlement, Class Counsel would have expended sizeable amounts of time and money: completing fact discovery (some of which would have taken place in Australia) and expert discovery (also some of which would take place in Australia); engaging in extensive motion practice, including responding to motions for summary judgment; litigating *Daubert* motions; and proving Class Representatives' claims at trial. Even if Class Representatives could recover an equally large judgment after a trial – which was far from certain given the risks described below and in the Joint Declaration – the additional delay through post-trial motions and the appellate process could deny the Class any recovery for years. *See In re Initial Pub. Offering Sec. Litig.*, 260 F.R.D. 81, 117 (S.D.N.Y. 2009) (additional "motions would be filed raising every possible kind of pre-trial, trial and post-trial issue conceivable"). In addition, an appeal of any verdict would carry the risk of reversal, in which case the Class would receive no recovery at all, even after having prevailed on the claims at trial. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[E]ven if a shareholder or class member was willing to

assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery.").

Furthermore, even winning at trial does not guarantee a recovery to the Class, because there is always a risk that the verdict could be reversed by the trial court or on appeal. *See, e.g.*, *Robbins v. Koger Props.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing $81 million jury verdict and dismissing case with prejudice in securities action); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation); *cf. In re Apollo Grp., Inc. Sec. Litig.*, No. CV-04-2147-PHX-JAT, 2008 WL 3072731 (D. Ariz. Aug. 4, 2008), *rev'd*, No. 08-16971, 2010 WL 5927988 (9th Cir. June 23, 2010) (trial court overturned unanimous verdict for plaintiffs, later reinstated by the Ninth Circuit Court of Appeals, and judgment re-entered after denial of *certiorari* by the U.S. Supreme Court).

Thus, this factor weighs heavily in favor of approval of the Settlement.

**2. The Reaction of the Class to the Settlement**

One court has noted that the reaction of a class to a settlement "is considered perhaps 'the most significant factor to be weighed in considering its adequacy.'" *Veeco Instruments*, 2007 WL 4115809, at *7. "[T]he absence of objectants may itself be taken as evidencing the fairness of a settlement." *In re PaineWebber Ltd. P'ship Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). While the deadline of October 25, 2017 for Class Members to object or seek exclusion has not passed, here, in response to a thorough Court-approved notice program, in which more than 28,000 Notices have been mailed to potential Class Members and their nominees,

to date, not a single Class Member has objected and only one request for exclusion from the Class has been received. *See* Sylvester Decl., ¶¶11, 15.[4]

**3. The Stage of the Proceedings and the Amount of Discovery Completed**

In considering this factor, "'the question is whether the parties had adequate information about their claims, such that their counsel can intelligently evaluate the merits of plaintiff's claims, the strengths of the defenses asserted by defendants, and the value of plaintiffs' causes of action for purposes of settlement.'" *Facebook*, 2015 WL 6971424, at *4; *Bear Stearns*, 909 F. Supp. 2d at 267; *see also Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 475 (S.D.N.Y. 2013) ("The pertinent question is 'whether counsel had an adequate appreciation of the merits of the case before negotiating.'").

At the time the Parties agreed to settle, Class Representatives and Class Counsel had a thorough understanding of the strengths and weaknesses of the claims and defenses asserted. The Litigation has been hotly contested from its inception, more than three years ago. As a result, Class Representatives' and Class Counsel's knowledge of the strengths and weaknesses of the claims alleged and the stage of the proceedings are more than adequate to support the Settlement. This knowledge is based on, among other things, Class Counsel's thorough investigation prior to filing the Complaint and the Second Amended Complaint; Class Counsel's extensive class and fact discovery; the briefing and orders on Defendants' motions to dismiss the Complaint and the Second Amended Complaint; as well as the briefing and order on class certification.

In particular, Class Counsel's investigation in connection with the preparation of the Second Amended Complaint was comprehensive, involving interviews with 35 individuals who were either

[4] If any objections or additional requests for exclusion are received, Class Representatives will respond in their reply papers due with the Court on November 8, 2017.

former Genworth employees or other persons with potentially relevant knowledge. Additionally, Class Counsel conducted an extensive review of publicly available information before filing the complaint, including documents filed publicly by the Company with the U.S. Securities and Exchange Commission; press releases, news articles, analyst reports, and other public statements concerning Genworth's business; press releases, reports and filings by or concerning Genworth's Australian subsidiary; transcripts, government records, and media reports about the Australian housing market and economy; and other publicly available information and data concerning Genworth, its securities, and the markets therefor. Joint Decl., ¶¶4, 17, 91.

In connection with formal merits discovery, Class Counsel engaged in an extremely labor intensive meet and confer and letter-writing process with Defendants on the scope of discovery, which included regular discovery conferences in order to resolve disputes, and ultimately obtained and analyzed approximately 2.1 million pages of documents from Defendants and approximately 227,000 pages of documents from non-parties and took four depositions of representatives of the Company (including the two Individual Defendants). *Id.*, ¶¶38-50. Class Counsel also consulted with experts on issues related to loss causation and damages, as well as an industry expert on issues pertaining to the mortgage industry in general as well as specifically in Australia. *Id.*, ¶¶57-58. Class Counsel also understood Defendants' defenses to the claims asserted in the Litigation through the extensive briefing on their motions to dismiss the complaints, the class certification motion, and the positions taken by Defendants in the course of settlement negotiations. *Id.*, ¶¶15-36, 59.

Class Counsel's investigation and discovery with respect to both liability and damages issues and legal analyses all enabled Class Representatives and Class Counsel to thoroughly understand and evaluate the strengths and weaknesses of the claims asserted, and accordingly to allow them to

engage in effective settlement discussions with Defendants. Therefore, this Court should find that this factor also supports approval of the Settlement.

**4. The Risk of Establishing Liability**

In assessing the Settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. As this case amply demonstrates, securities class actions present hurdles to proving liability that are difficult for plaintiffs to meet. *See AOL Time Warner*, 2006 WL 903236, at *11 (noting that "[t]he difficulty of establishing liability is a common risk of securities litigation"); *Alloy*, 2004 WL 2750089, at *1 (finding that issues present in securities action presented significant hurdles to proving liability).

Class Representatives' case centered on allegations that Defendants made false and misleading statements and omissions about the strength of Genworth's Australian MI unit and the Australian housing market in advance of a minority share initial public offering of that Australian MI unit (the "IPO"). The principal claims in the Litigation are based on §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. To establish a claim under the Exchange Act, "a plaintiff must prove: (1) the defendant made a material misrepresentation or omission; (2) with scienter; (3) in connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation." *IBEW Local Union No. 58 Pension Trust Fund & Annuity Fund v. Royal Bank of Scotland Grp. PLC*, 783 F.3d 383, 389 (2d Cir. 2015) (citing *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008)). Further litigation to establish liability posed a significant threat to any recovery for the Class.

While Class Representatives believe that they would be successful at summary judgment and at trial and that the allegations of the Second Amended Complaint would ultimately be borne out by

the evidence, they also recognize that they faced significant hurdles to proving liability. There is no question that Class Representatives would have confronted a number of challenges in establishing liability at trial, considering the highly fact-intensive nature of the alleged fraud at issue and the vigorous opposition by Defendants to all elements of liability. Indeed, Defendants' arguments in motions and settlement negotiations made it clear that the Parties held, in many cases, polar opposite views of the factual and legal issues presented, many of which would have been the subject of expert testimony.

For example, Class Representatives faced a significant challenge in proving that the Individual Defendants acted with scienter. *See In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 579 (S.D.N.Y. 2008) ("Proving a defendant's state of mind is hard in any circumstances."). Here, Defendants would argue, among other things, that the evidence does not allow Class Representatives to tie what was happening in Australia back to the Individual Defendants – the two most senior executives of a holding company located in the United States. *See* Joint Decl., ¶71.

Additionally, the evidence uncovered to date has shown that the Class Representatives faced an especially uphill battle in proving scienter for the first half of the Class Period. Defendants would argue that there was no evidence indicating that there was any spike in claims during the first part of the Class Period. As alleged in the Second Amended Complaint, in February and March 2012, there were positive statements being made by Genworth senior management that the IPO was on track, among other statements. At the same time, there are certain documents indicating that Genworth senior management in the United States were advised of the impending claims spike in early 2012. Furthermore, even though the evidence to date shows that Defendants may have been advised of the spike in claims in March 2012, Defendants would argue that as soon as the Individual Defendants learned of the impending spike in claims in Australia in March 2012, they conducted a deep dive to

figure out the cause. Defendants would contend that following the deep dive, the Company timely announced the IPO delay on April 17, 2012, and therefore they did nothing wrong. *Id.*

Finally, Defendants would also likely contend that Genworth's independent actuary and its auditor approved the loss reserves and found them adequate. The issue of whether the loss reserves were increased sufficiently during the Class Period would have been hotly contested by the Parties and would have required expert testimony. *Id.*, ¶71.

Although Class Representatives were confident that they would have been able to gather sufficient evidence to establish scienter for conduct during the latter part of the Class Period, they also knew that even this would involve unique challenges, given, among other things, activity that took place in Australia within a subsidiary of the Company. Continued litigation involved substantial risks in proving Defendants' liability and a finding in favor of the Class by the jury was never assured. Defendants had potentially valid defenses to Class Representatives' claims that posed significant risks to the Class's recovery. Therefore, this Court should find that this factor also supports approval of the Settlement.

**5. The Risks of Establishing Loss Causation and Damages**

Even if Defendants' liability were established, Class Representatives would have to prove the existence of loss causation and damages. Loss causation requires proof of a "causal connection between the material misrepresentation and the [economic] loss" suffered. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 338 (2005). Once causation is established, damages estimation remains "a 'complicated and uncertain process, typically involving conflicting expert opinion' about the difference between the purchase price and [share]s 'true' value absent the alleged fraud." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004).

Here, the Class Representatives' damages expert has estimated maximum class-wide aggregate damages of approximately $219 million, if the Class Representatives were able to prove liability for the entire Class Period (November 3, 2011 through April 17, 2012, inclusive) and establish that 100% of the abnormal drop on April 17, 2012 was attributable to the alleged fraud. However, as noted above and in the Joint Declaration, proving scienter for the entire Class Period would be challenging given the amount of evidence, to date, tying the Individual Defendants' knowledge in the second half of 2011 to a spike in claims in the Australian MI unit. If the Class Period began on February 3, 2012 or March 29, 2012 (when Defendants were making positive statements regarding the Australian MI unit's financials and the Australian IPO and where proving scienter would be less difficult), damages, according to the Class Representatives' damages expert, would be approximately $170 million and $90 million, respectively (again assuming that 100% of the abnormal return on April 17, 2012 was attributed to the alleged fraud). Joint Decl., ¶75.

The amount of damages incurred by Class Members would be hotly-contested at trial using highly qualified competing experts who would strongly disagree with each other's assumptions and respective methodologies, including the method of disaggregating potentially confounding news from the alleged fraud-related cause of the stock drops. *See id.*, ¶76. Therefore, the risk that the jury would credit Defendants' damages position over that of Class Representatives had considerable consequences in terms of the amount of recovery for the Class, even assuming liability was proven. The reaction of a jury to battling expert testimony is highly unpredictable. Class Counsel recognize the possibility that a jury could be swayed by convincing testimony from Defendants' expert, and find little or no damages. *See, e.g.*, *Veeco Instruments*, 2007 WL 4115809, at *10 ("The jury's verdict with respect to damages would depend on its reaction to the complex testimony of experts, a reaction which at best is uncertain.").

Accordingly, the substantial and certain payment of $20,000,000.00 by Defendants, particularly when viewed in the context of the significant risks and the uncertainties involved in this Litigation, clearly weighs heavily in favor of approving the Settlement.

**6. The Risks of Maintaining the Class Action Through Trial**

Although the Court certified the Class on March 7, 2016, certification can be reviewed and modified at any time by the Court before final judgment. *See* Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); *see also Annunziato v. Collecto, Inc*., 293 F.R.D. 329, 340 (E.D.N.Y. 2013) ("'[u]nder rule 23, district courts have the power to amend class definitions or decertify classes as necessary'"). There was also a risk that the jury could be persuaded by Defendants' arguments that the Class Period should be shorter, among other arguments, which could have drastically decreased damages. The Settlement avoids any uncertainty with respect to these issues.

**7. Ability to Withstand a Greater Judgment**

The ability of a defendant to pay a judgment greater than the amount offered in settlement is relevant to whether the settlement is fair. *Grinnell*, 495 F.2d at 463. However, even if defendants could withstand a greater judgment, "this factor, standing alone, does not suggest the settlement is unfair," especially where, as here, the "other Grinnell factors weigh heavily in favor of settlement." *D'Amato*, 236 F.3d at 86; *see also Cavalieri v. Gen. Elec. Co*., No. 06cv315 (GLS/DRH), 2009 WL 2426001, at *2 (N.D.N.Y. Aug. 6, 2009) ("The court also notes that although neither party contends that defendants are incapable of withstanding greater judgment, that does not 'indicate that the settlement is unreasonable or inadequate.'"); *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at *8 (S.D.N.Y. May 1, 2008) ("a defendant is not required to 'empty its coffers' before a settlement can be found adequate").

While it is unclear whether Defendants are capable of withstanding a greater judgment, as a practical matter the prospects of recovering a substantially greater sum would have been offset by the inevitable post-trial motions and appeals Defendants would likely pursue following any judgment. Additionally, settlement eliminates the risk of collection. Defendants have paid the $20,000,000 into an escrow account pursuant to the Stipulation, which is already earning interest for the Class. *See Prasker v. Asia Five Eight LLC*, No. 08 Civ. 5811(MGC), 2010 WL 476009, at *5 (S.D.N.Y. Jan. 6, 2010) (approving settlement and noting that "[t]he settlement eliminated the risk of collection by requiring Defendants to pay the Fund into escrow").

**8. The Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation**

The last two substantive factors courts within the Second Circuit consider are the range of reasonableness of a settlement in light of (i) the best possible recovery and (ii) litigation risks. *Grinnell*, 495 F.2d at 463. In analyzing these last two factors, the issue for the Court is not whether the Settlement represents the best possible recovery, but how the Settlement relates to the strengths and weaknesses of the case. The court "'consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.'" *Id.* at 462. Courts agree that the determination of a "reasonable" settlement "'is not susceptible of a mathematical equation yielding a particularized sum.'" *PaineWebber*, 171 F.R.D. at 130. Instead, "in any case there is a range of reasonableness with respect to a settlement[.]" *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *see also Global Crossing*, 225 F.R.D. at 461 (noting that "the certainty of [a] settlement amount has to be judged in [the] context of the legal and practical obstacles to obtaining a large recovery"); *In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00 Civ. 6689 (SAS), 2003 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003) (noting few cases tried before a jury result in full amount of damages claimed).

Here, according to analyses prepared by Class Representatives' damages expert, the Settlement represents a recovery of approximately 9% of the estimated maximum damages of approximately $219 million, under a best case scenario where Class Representatives were able to prove liability for the entire Class Period and establish that 100% of the abnormal return was attributable to the alleged fraud. *See* Joint Decl., ¶¶75-76. The Settlement recovers significantly more, if for instance, the Class were only able to recover for the latter part of the Class Period, beginning on March 29, 2012, where there was less risk in proving scienter. If the Class were only able to recover for a more limited class period of March 29, 2012 through April 17, 2012, the Settlement recovers 22% of the estimated $90 million in damages. *See id.*, ¶75.

Thus, the recovery falls well within the range of reasonableness that courts regularly approve in similar circumstances. *See, e.g.*, *In re Gilat Satellite Networks, Ltd.*, No. CV 02-1510 (CPS), 2007 WL 2743675, at *12 (E.D.N.Y. Sept. 18, 2007) (court approved $20 million settlement representing 10% of maximum damages); *In re Merrill Lynch & Co. Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *10 (S.D.N.Y. Feb. 1, 2007) (court approved $40.3 million settlement representing approximately 6.25% of estimated damages and noting that this is at the "higher end of the range of reasonableness of recovery in class actions securities litigation"); *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008) ($13.75 million settlement yielding 6% of potential damages was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements"). Moreover, the Settlement also presents a superior recovery when compared to the median reported settlement amounts as a percentage of estimated damages in securities class actions, which was 2.5% in 2016. *See* Laarni T. Bulan, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2016 Review and Analysis* at 7, Figure 6 (Cornerstone Research 2017), attached hereto as Exhibit 1.

Considering the risk that the Class might not have been able to prove liability at trial, and the possibility that damages awarded by a jury could have been significantly lower than those demanded by the Class (or none at all), the Settlement is a very good recovery. *See Indep. Energy*, 2003 WL 22244676, at *4 (noting few cases tried before a jury result in full amount of damages claimed); *In re Citigroup Inc. Sec., Litig*., No. 09 MD 2070 (SHS), 2013 WL 3942951, at *11 (S.D.N.Y. Aug. 1, 2013) (noting that "the risk that the class would recover nothing or would recover a fraction of the maximum possible recovery must factor into the decision-making calculus").

## IV. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

If the Court approves the proposed Settlement, upon completion of the claims filing process, the Net Settlement Fund will be distributed to Class Members according to the Plan of Allocation set forth in the Notice. "[T]he adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *PaineWebber*, 171 F.R.D. at 133; *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 316-17 (E.D.N.Y. 2006). As with the Settlement, the opinion of experienced and informed counsel carries considerable weight. *See Indep. Energy*, 2003 WL 22244676, at *5. "When formulated by competent and experienced class counsel, an allocation plan need have only a 'reasonable, rational basis.'" *Global Crossing*, 225 F.R.D. at 462.

The Plan of Allocation, which was fully described in the Notice, was prepared with the assistance of Class Representatives' consulting damages expert and provides for the distribution of the Net Settlement Fund among Authorized Claimants based upon each Class Member's "Recognized Loss," as calculated by the formulas described in the Notice. In developing the Plan of Allocation, the Class Representatives' consulting damages expert considered the amount of artificial inflation present in Genworth's common stock throughout the Class Period that was alleged to be

caused by the alleged fraud. In calculating the estimated artificial inflation alleged to be caused by those alleged misrepresentations and omissions, Class Representatives' damages expert considered price changes in Genworth common stock in reaction to the public disclosure that Class Representatives alleged corrected the respective alleged misrepresentations and omissions, and adjusted the price change for factors that were attributable to market or industry forces.

Gilardi & Co. LLC, as the Court-approved Claims Administrator, will determine each Authorized Claimant's *pro rata* share of the Net Settlement Fund based upon each Authorized Claimant's total Recognized Loss compared to the aggregate Recognized Losses of all Authorized Claimants, as calculated in accordance with the Plan of Allocation. The calculation will depend upon several factors, including when the Authorized Claimant's common stock was purchased, whether the stock was sold during the Class Period, and, if so, when. Joint Decl., ¶82.

Accordingly, the proposed Plan of Allocation is designed to fairly and rationally allocate the proceeds of this Settlement among the Class. Notably, no member of the Class has objected to the Plan of Allocation to date. Accordingly, Class Counsel respectfully request that this Court approve the Plan of Allocation.

## V. CONCLUSION

The Settlement reached in this Litigation is a very good result that provides an immediate substantial and certain benefit for the Class. For the reasons set forth herein and in the Joint Declaration, Class Representatives and Class Counsel respectfully submit that the Settlement and

Plan of Allocation are fair, reasonable, and adequate, and request the Court grant final approval of the Settlement and Plan of Allocation.[5]

DATED: October 11, 2017

Respectfully submitted,

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Lead Counsel for Plaintiffs

[5] A proposed form of Judgment, negotiated by the Parties, and a proposed order approving the Plan of Allocation will be submitted to the Court with Class Representatives' reply papers, after the deadlines for seeking exclusion and objecting have passed.

CERTIFICATE OF SERVICE

I, Douglas R. Britton, hereby certify that on October 11, 2017, I authorized a true and correct copy of the MEMORANDUM IN SUPPORT OF CLASS REPRESENTATIVES' MOTION FOR FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION, to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such public filing to all counsel registered to receive such notice.

s/ Douglas R. Britton
DOUGLAS R. BRITTON

# EXHIBIT 1

CORNERSTONE RESEARCH

Economic and Financial Consulting and Expert Testimony

# Securities Class Action Settlements

**2016 Review and Analysis**

# Table of Contents



The views expressed in this report are solely those of the authors, who are responsible for the content, and do not necessarily represent the views of Cornerstone Research.

# Table of Figures and Appendices



Analyses in this report are based on 1,621 securities class actions filed after passage of the Private Securities Litigation Reform Act of 1995 (Reform Act) and settled from 1996 through year-end 2016. See page 20 for a detailed description of the research sample. For purposes of this report and related research, a settlement refers to a negotiated agreement between the parties to the securities class action that is publicly announced to potential class members by means of a settlement notice.

# Highlights

- The number of securities class action settlements approved in 2016 grew to 85—the highest level since 2010. (page 3)
- Total settlement dollars approved by courts in 2016 was nearly $6 billion, almost double the total in 2015 and the second highest in the past 10 years. (page 3)
- The total value of mega settlements (settlements over $100 million) in 2016 represented more than two times the value for these cases in 2015. (page 4)
- The median settlement amount in 2016 was $8.6 million, about 40 percent higher than the 2015 median of $6.1 million. (page 5)
- Compared to the prior five years (2011–2015), 2016 average "estimated damages" were 30 percent higher while median "estimated damages" were almost 15 percent lower. (page 6)
- Median settlements as a percentage of "estimated damages" in 2016 increased 24 percent from the 2011–2015 median and were higher than any annual percentage in the last five years. (page 8)
- Median Disclosure Dollar Loss (DDL) associated with 2016 settlements was 50 percent more than the prior year. (page 10)
- The year 2016 had the highest percentage of cases settling within two years of the filing date since 2006. (page 17)

Figure 1: Settlement Statistics

(Dollars in Millions)

| | 1996–2015 | 2015 | 2016 |
|---|---|---|---|
| Minimum | $0.1 | $0.4 | $0.9 |
| Median | $8.3 | $6.1 | $8.6 |
| Average | $55.5 | $38.4 | $70.5 |
| Maximum | $8,611.2 | $982.8 | $1,575.0 |
| Total Amount | $85,266.6 | $3,072.8 | $5,990.0 |
| Number of Settlements | 1,536 | 80 | 85 |

Note: Settlement dollars are adjusted for inflation; 2016 dollar equivalent figures are used.

# 2016 Findings and Perspectives

Continuing the growth observed in the prior year, the number of settlements approved in 2016 increased to 85—substantially higher than the levels in 2011 through 2014. This escalation can be attributed to the recent increase in case filings.

## Mega Settlements

Ten mega settlements in 2016—the highest number over the last 10 years—contributed to an almost twofold increase in the average settlement amount from 2015 to 2016. Two of the mega settlements exceeded $1 billion. This was the first year since 2006 with multiple settlements over $1 billion.

## "Estimated Damages"

To understand the latest settlement trends, it is helpful to consider the important determinants of settlement amounts. The most important factor in explaining settlement amounts is a proxy ("estimated damages") for shareholder damages. For settlements approved in 2016, average "estimated damages" reached the second-highest amount over the last 10 years. Settlements as a percentage of "estimated damages" also increased over 2015, indicating that other factors likely contributed to the rise in settlement amounts as well. In particular, the percentage of settlements with public pension plans as lead plaintiffs and the number of restatement cases increased in 2016. In addition, the size of the issuer defendant (as measured by total assets) was substantially higher in 2016 as compared to 2015. All of these factors are associated with higher settlement amounts.

*"Higher settlements in 2016 were driven not only by higher 'estimated damages' but also by other case factors, leading to a six-year high in settlements as a percentage of 'estimated damages.'"*

*Dr. Laura E. Simmons*
*Senior Advisor*
*Cornerstone Research*

## Developing Trends

The record number of case filings in 2016,[1] coupled with four consecutive year-over-year increases, may continue to fuel growth in the number of settlements into the coming years.

While the number of settlements may increase, the most recent data on case filings, however, indicate a potential decline in very large cases, as measured by market capitalization losses. This suggests that, at some point in the next few years, a drop in mega settlements may follow.

Industry trends among securities class actions have fluctuated in the last 20 years but, according to Cornerstone Research's *Securities Class Action Filings—2016 Year in Review*, healthcare and related industry sectors, such as biotech and pharmaceuticals, may play a growing role in both the number and total dollar amounts of settlements in securities class actions.

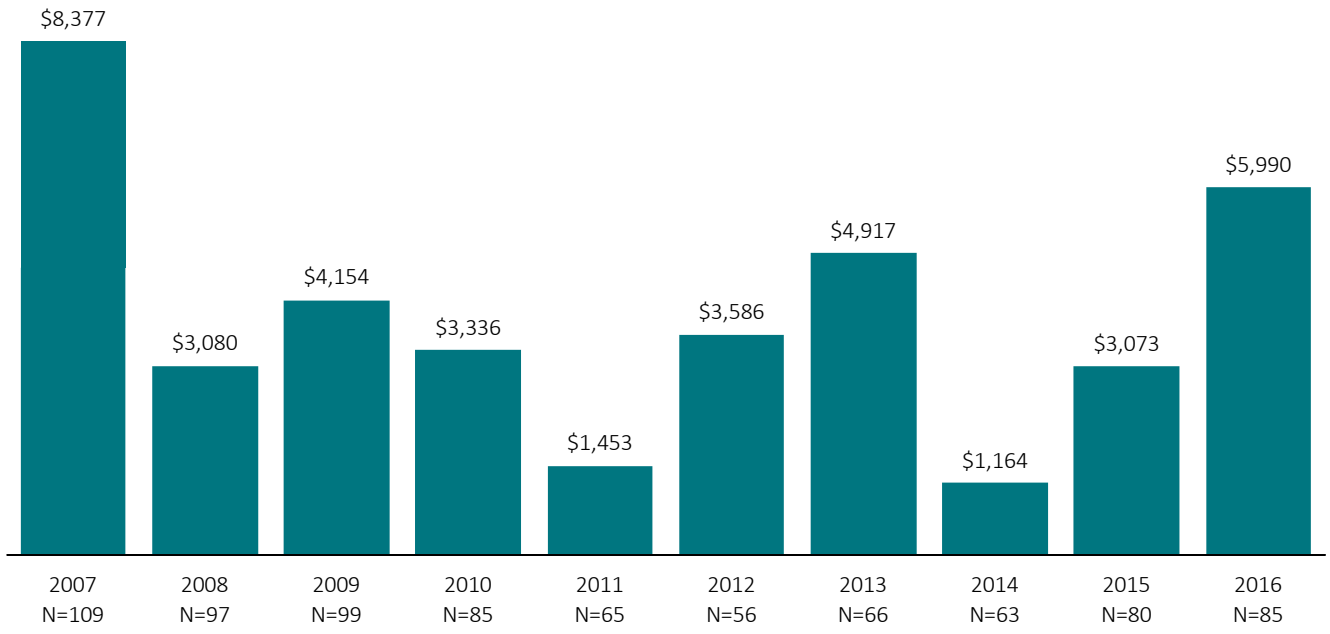
# Total Settlement Dollars

- The total value of settlements approved by courts in 2016 was more than $5.9 billion, almost double the amount approved in 2015.
- The higher number of mega settlements in 2016 and the corresponding higher average settlement value for these cases contributed to the substantial increase in total settlement dollars.
- The number of settlements approved in 2016 increased only modestly from 2015, but grew substantially over the annual numbers from 2011 to 2014.

*2016 total settlement dollars exceeded inflation-adjusted totals for eight of the nine prior years.*

Figure 2: Total Settlement Dollars
2007–2016

(Dollars in Millions)



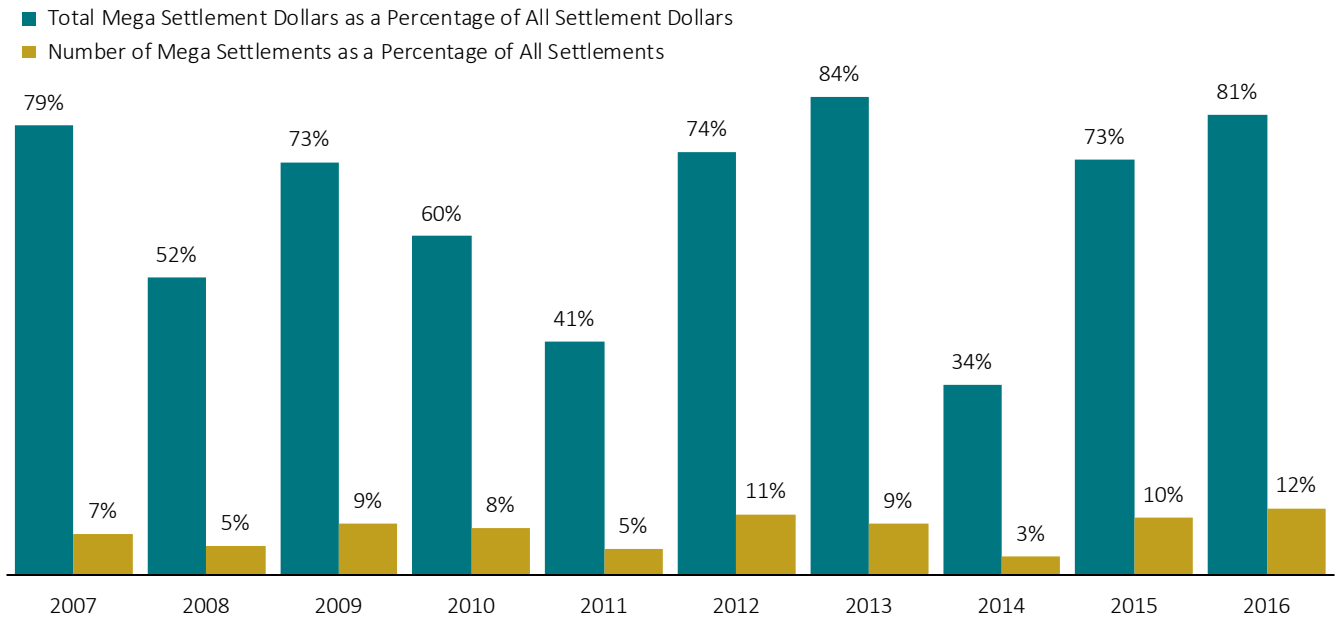

Note: Settlement dollars are adjusted for inflation; 2016 dollar equivalent figures are used.

# Mega Settlements

- Four of the 10 approved mega settlements in 2016 were between $100 million and $250 million; four were between $250 million and $500 million; and two exceeded $1 billion. The last observed settlement over $1 billion was in 2013.
- The median mega settlement in 2016 was $318 million, almost twice the median in 2015.
- In 2016, $4.8 billion of the total $6 billion settlement value came from mega settlements.
- The number of mega settlements as a percentage of all settlements in 2016 was the highest over the last 10 years.
- Mega settlements have accounted for 72 percent of all settlement dollars on average from 2007–2016.

*The total value of mega settlements in 2016 was more than two times the prior year's value.*

Figure 3: Mega Settlements
2007–2016



# Settlement Size

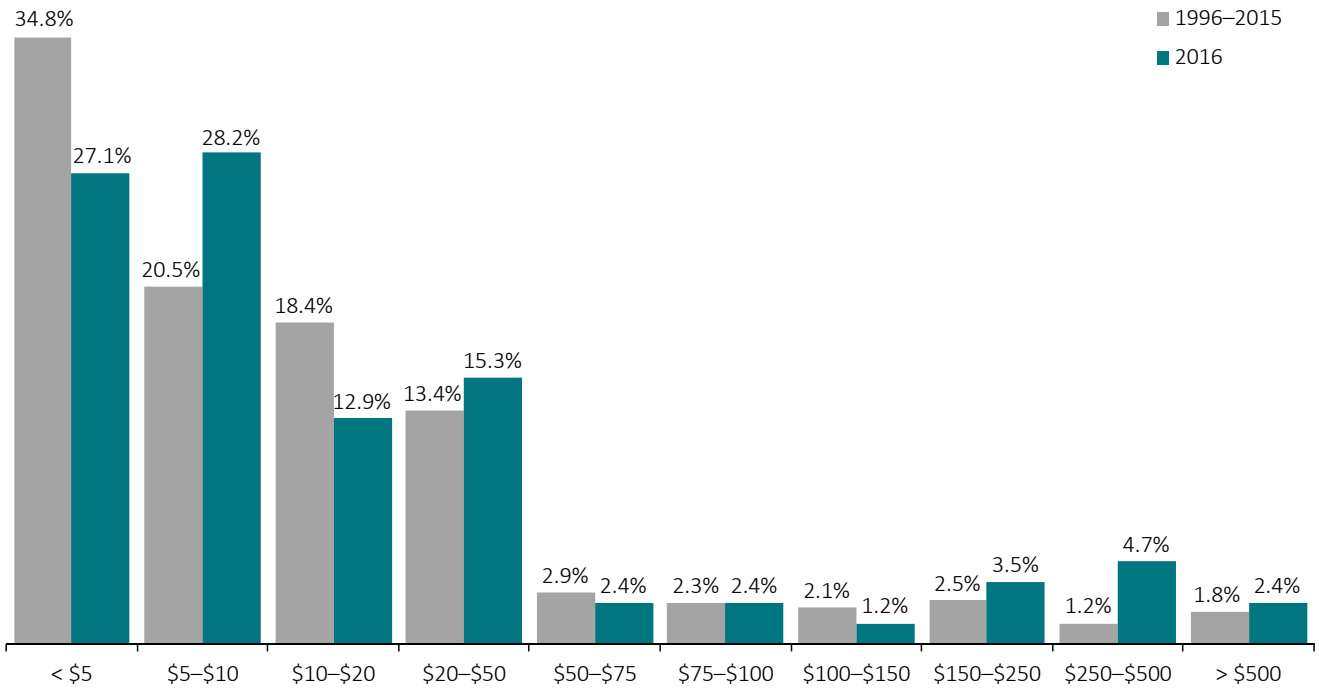
- The proportion of cases settling for $2 million or less (often referred to as "nuisance suits") in 2016 was 12 percent (10 cases), a drop from 25 percent (20 cases) in 2015 and a return to 2013 and 2014 proportions.
- The percentage of cases settling for less than $5 million also decreased in 2016 compared to prior years.

*The median settlement amount increased more than 40 percent from $6.1 million in 2015 to $8.6 million in 2016.*

- In 2016, 56 percent of settlements fell between $5 million and $50 million, 18 percent higher than the rate for all prior post–Reform Act years.
- Among all post–Reform Act settlements, 79 percent have been for amounts equal to or less than $25 million.
- The higher proportion of 2016 cases settling for $150 million or more reflects the record number of mega settlements compared to the last 10 years.
- Median total assets for issuer defendants settling in 2016 were more than 41 percent higher than the median asset value for 2015 settlements (adjusted for inflation) and 15 percent higher than the median total assets for issuers settling in the prior 10 years.

Figure 4: Distribution of Post–Reform Act Settlements

(Dollars in Millions)




Note: Settlement dollars are adjusted for inflation; 2016 dollar equivalent figures are used.

# Damages Estimates and Market Capitalization Losses

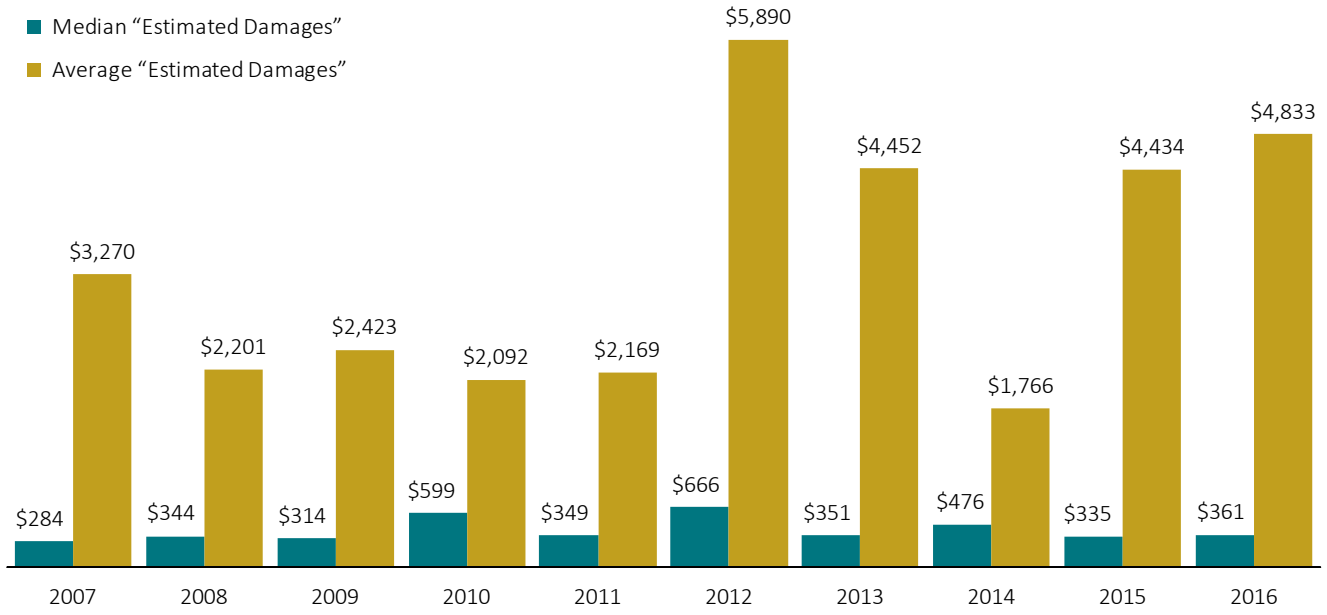
## "Estimated Damages"

"Estimated damages" are a simplified measure of potential shareholder losses that allows for use of a consistent method in this study and therefore the identification and analysis of potential trends. While "estimated damages" are found to be the most important factor in predicting settlement amounts, they are not necessarily linked to the allegations in the associated court pleadings.[2] The damages estimates presented in this report are not intended to be indicative of actual economic losses borne by shareholders.

*Average "estimated damages" in 2016 were the second highest in the last 10 years.*

- Average and median "estimated damages" for 2016 increased modestly from 2015 (9 percent and 8 percent, respectively).
- Compared to the average and median values for the previous five years (2011–2015), however, 2016 average "estimated damages" were 30 percent higher while median "estimated damages" were 14 percent lower.
- Overall, higher "estimated damages" are associated with larger issuer defendants (measured by total assets of the issuer) and more mature firms (measured by the length of time publicly traded). In addition, plaintiffs are more likely to name third-party defendants in larger cases (as measured by "estimated damages").

Figure 5: Median and Average "Estimated Damages"
2007–2016
(Dollars in Millions)



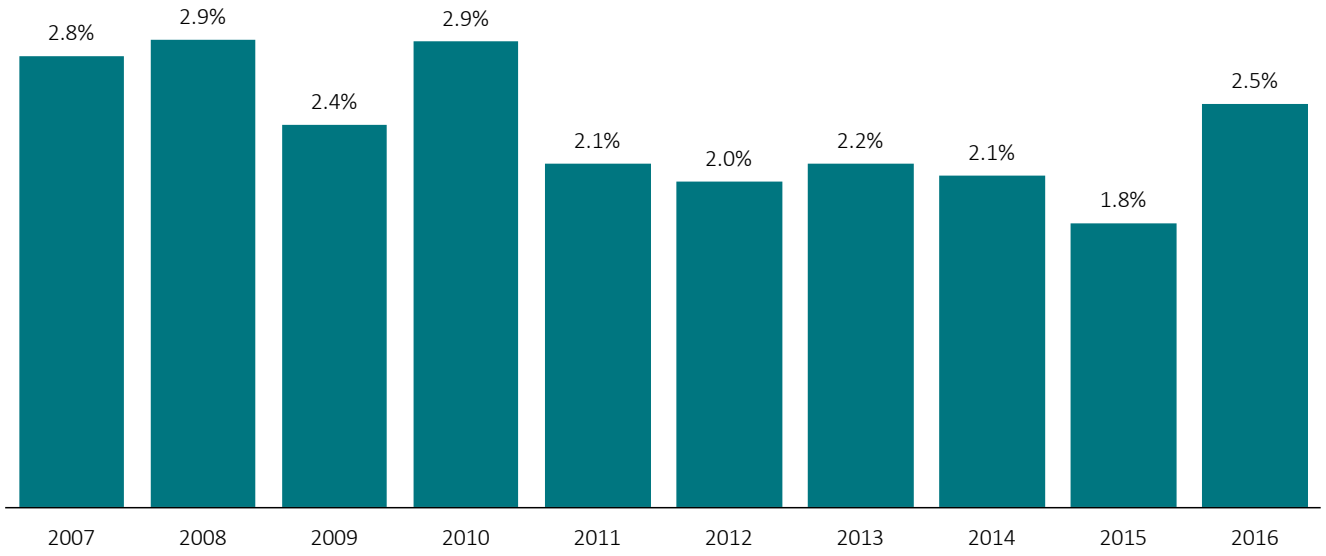

Note: "Estimated damages" are adjusted for inflation based on class period end dates.

## "Estimated Damages" *continued*

- In 2016, median settlements as a percentage of "estimated damages" increased 39 percent over 2015.
- While the median settlement as a percentage of "estimated damages" for mega settlements has often been lower than for non-mega settlements, in 2016 it was slightly higher (2.7 percent and 2.5 percent for mega settlements and non-mega settlements, respectively).

*In 2016, median settlements as a percentage of "estimated damages" jumped from 2015's historic low.*

Figure 6: Median Settlements as a Percentage of "Estimated Damages"
2007–2016



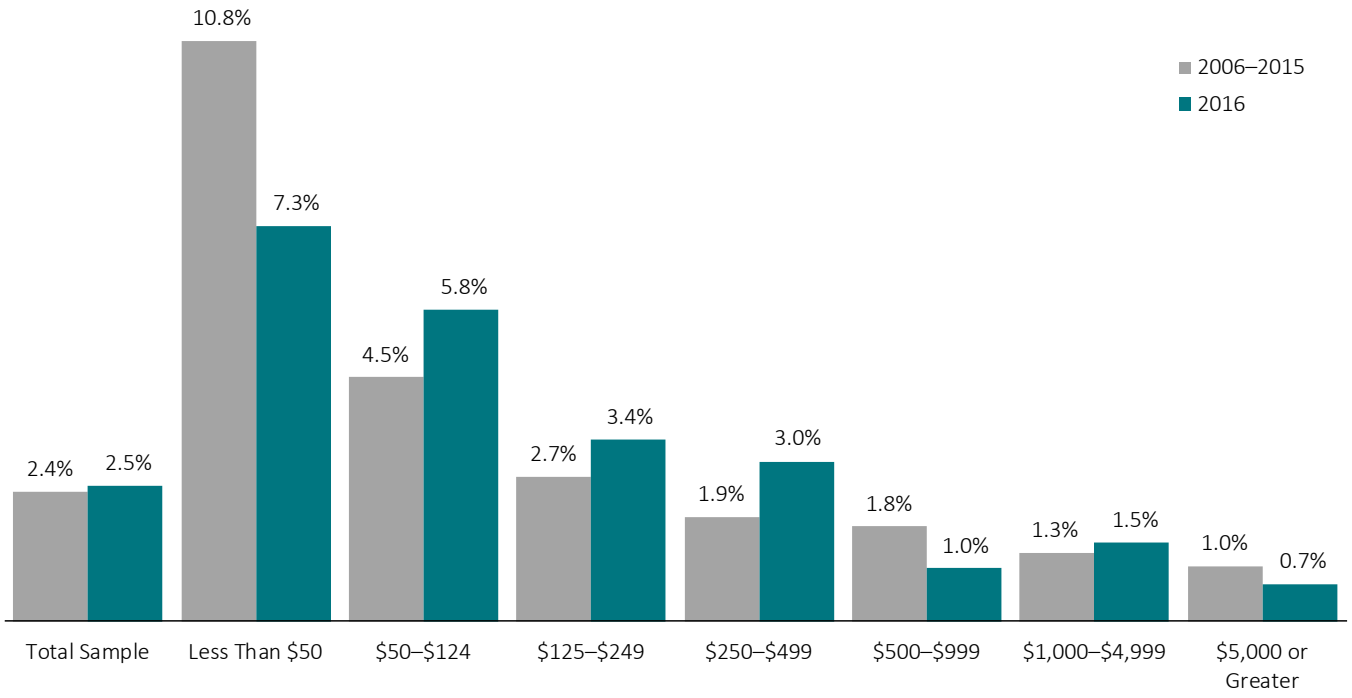
## "Estimated Damages" *continued*

- Smaller cases settled for a lower percentage of "estimated damages" in 2016 relative to mid-range cases when compared to prior years.
- Median settlements as a percentage of "estimated damages" in 2016 increased 24 percent from the 2011–2015 median and were higher than any percentage in the last five years.

*The rise in the 2016 median settlement as a proportion of "estimated damages" puts it in line with the median for the prior 10 years.*

Figure 7: Median Settlements as a Percentage of "Estimated Damages" by Damages Ranges

(Dollars in Millions)



## Damages Estimation Approaches

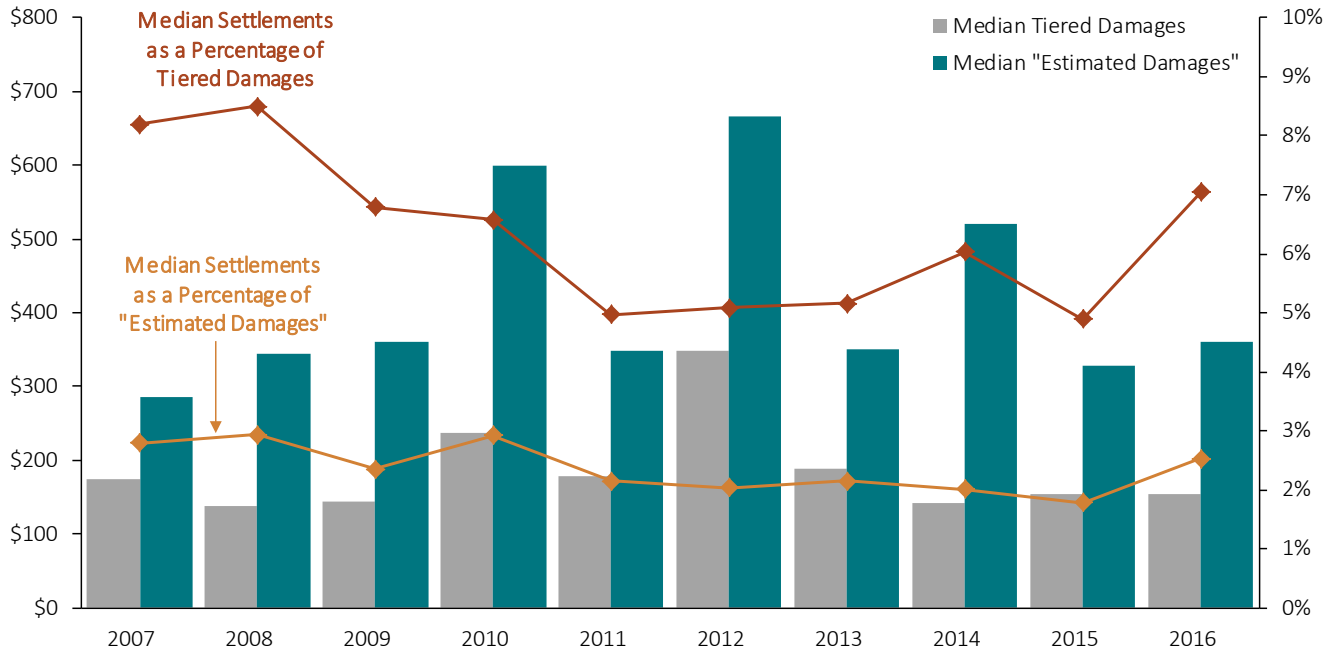
"Estimated Damages" vs. Tiered Damages

Tiered damages are an alternative damages measure based on the dollar value of stock price movements on dates detailed in the settlement plan of allocation. They provide an alternative measure of potential investor losses for more recent securities class action settlements.[3]

As a measure that is based on specific company stock price declines (either at the end or during the class period), rather than daily deviations from movements in an index, tiered damages are conceptually more closely aligned with the approach typically followed by plaintiffs in recent years to estimate damages. The methodology for tiered damages also accounts for the U.S. Supreme Court's 2005 landmark decision in *Dura* whereby damages cannot be associated with shares sold before information regarding the alleged fraud reaches the market.[4]

Tiered damages, like "estimated damages," are highly correlated with settlement amounts and are an important component in ongoing analyses of settlement outcome determinants.

Figure 8: Damages Estimation Approaches
2007–2016
(Dollars in Millions)




Note: Damages figures are adjusted for inflation based on class period end dates.

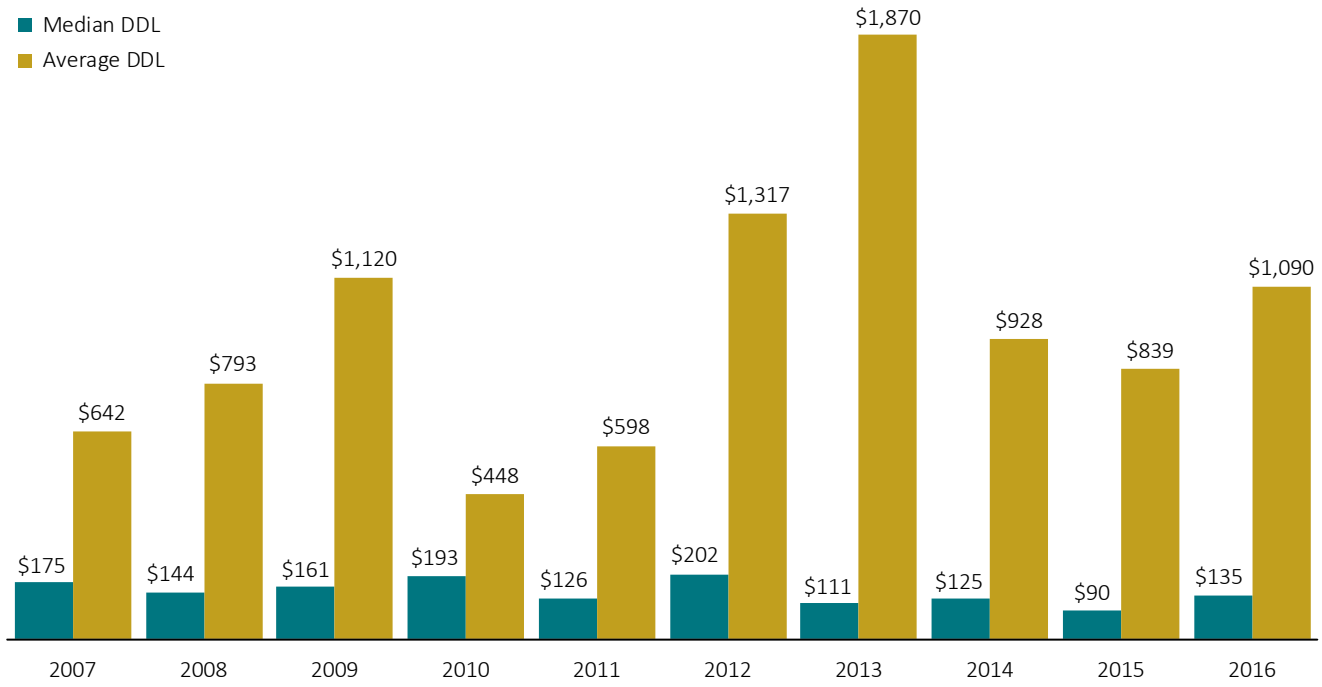
## Disclosure Dollar Loss

Disclosure Dollar Loss (DDL) captures the stock price reaction to the class-ending disclosure that resulted in the first filed complaint. DDL is calculated as the decline in the market capitalization of the defendant firm from the trading day immediately preceding the end of the class period to the trading day immediately following the end of the class period and, as such, does not incorporate any estimate of the number of shares traded during the class period.[5]

*Median DDL in 2016 was 50 percent more than 2015.*

- With an increase in both the average and median DDL over 2015, the trend in DDL for cases settled in 2016 follows a pattern similar to that for "estimated damages."
- While the aggregate trends in DDL and "estimated damages" are often similar, for individual cases, the two measures typically differ substantially.
- Total DDL associated with settlements approved in 2016 was nearly $81 billion, 20 percent below the average from 2007 through 2015.

Figure 9: Median and Average Disclosure Dollar Loss
2007–2016
(Dollars in Millions)




Note: DDL is adjusted for inflation based on class period end dates.

# Analysis of Settlement Characteristics

## Nature of Claims

- In 2016, there were 10 settlements involving Section 11 and/or Section 12(a)(2) claims ('33 Act claims) that did not involve Rule 10b-5 allegations, the second most active year in the last decade.[6]
- Cases settling in 2016 involving combined claims (Rule 10b-5 and Section 11 and/or Section 12(a)(2) claims) had, on average, twice as many federal docket entries as cases involving just Rule 10b-5 claims—indicating the more complex nature of such matters.
- As reported in Cornerstone Research's *Securities Class Action Filings—2016 Year in Review*, the frequency of filings involving Section 11 claims in California state courts has increased in recent years.[7]
- Four of the five state court settlements in 2016 were for California state cases with '33 Act claims only.

*Settlements as a percentage of "estimated damages" are considerably higher for cases with only Section 11 and/or Section 12(a)(2) claims because these cases typically have smaller "estimated damages" compared to other claim types.*

Figure 10: Settlements by Nature of Claims
1996–2016

(Dollars in Millions)

| | Number of Settlements | Median Settlement | Median "Estimated Damages" | Median Settlement as a Percentage of "Estimated Damages" |
|---|---|---|---|---|
| Section 11 and/or Section 12(a)(2) Only | 97 | $4.0 | $55.6 | 7.4% |
| Both Rule 10b-5 and Section 11 and/or 12(a)(2) | 281 | $13.6 | $537.2 | 3.0% |
| Rule 10b-5 Only | 1,220 | $8.1 | $373.4 | 2.5% |

Note: Settlement dollars and "estimated damages" are adjusted for inflation; 2016 dollar equivalent figures are used. "Estimated damages" are adjusted for inflation based on class period end dates.

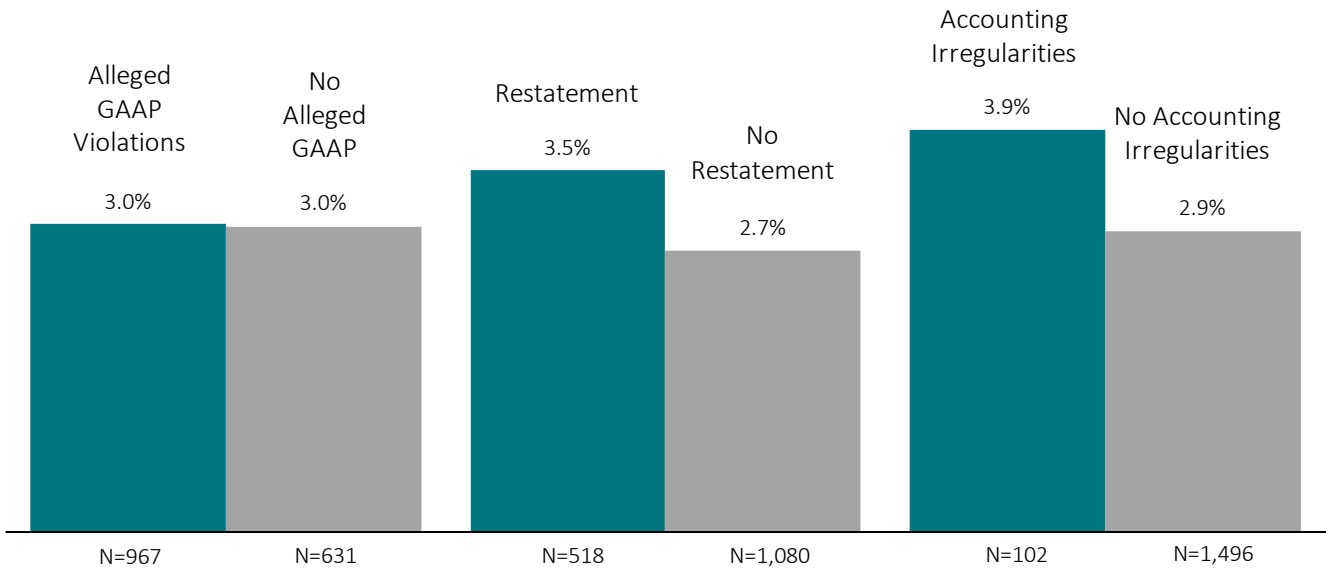
## Accounting Allegations

This research examines three types of accounting issues among settled cases: (1) alleged GAAP violations, (2) restatements, and (3) reported accounting irregularities.[8] For further details regarding settlements of accounting cases, see Cornerstone Research's annual report on *Accounting Class Action Filings and Settlements*.

- Among all post–Reform Act settlements, alleged GAAP violations are included in approximately 60 percent of cases. In 2016, however, the frequency of GAAP violation allegations was 54 percent.
- Restatements were involved in more than 30 percent of cases settled in 2016. These cases were associated with higher settlements as a percentage of "estimated damages" compared to cases without restatements.
- In 2016, no settlements involved reported accounting irregularities, and there was only one such case among 2015 settlements. Historically, approximately 6 percent of cases involve accounting irregularities.

*The percentage of cases alleging GAAP violations declined for a second straight year in 2016.*

Figure 11: Median Settlements as a Percentage of "Estimated Damages" and Accounting Allegations
1996–2016

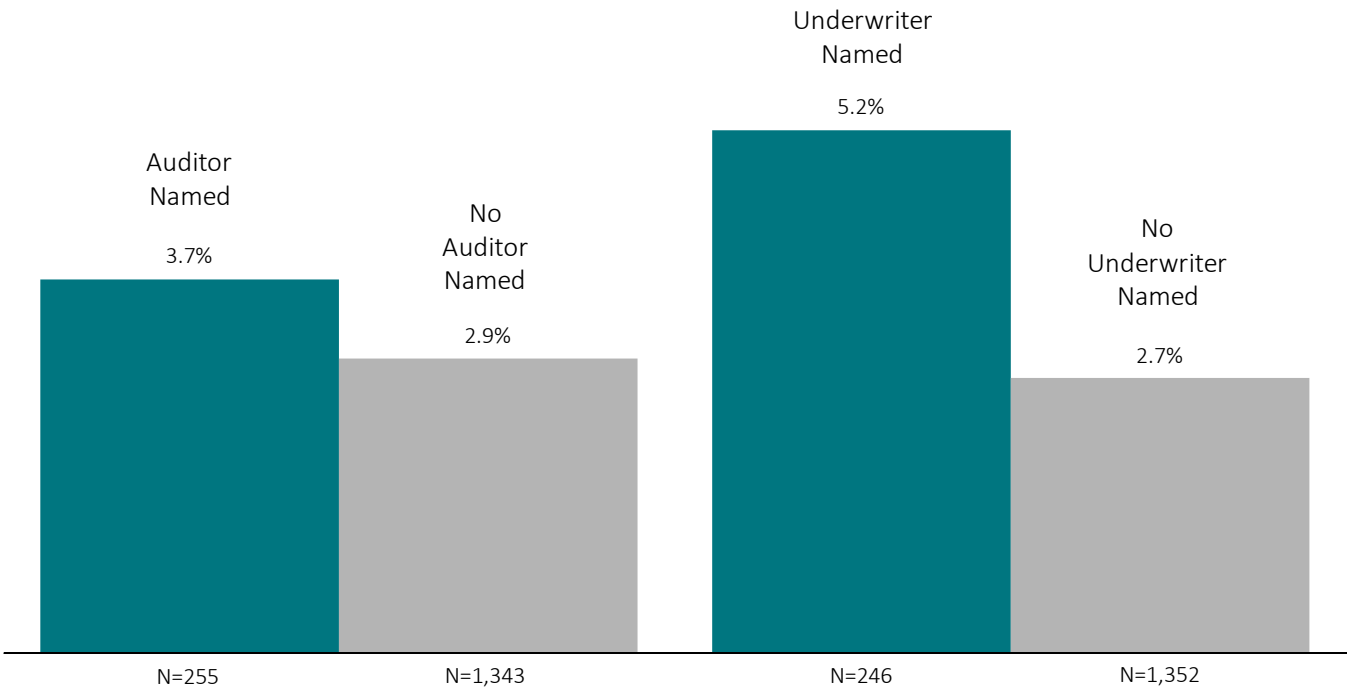


## Third-Party Codefendants

- Third parties, such as an auditor or an underwriter, are often named as codefendants in larger, more complex cases.
- In 2016, however, the median settlement for cases with a third-party named defendant was 26 percent lower than for cases without a third-party named defendant.
- Only 17 percent of accounting-related case settlements in 2016 had a named auditor defendant.
- Underwriter defendants were named in 79 percent of cases with Section 11 claims in 2016.

*On average, 27 percent of post–Reform Act settlements involved a named auditor or underwriter codefendant.*

Figure 12: Median Settlements as a Percentage of "Estimated Damages" and Third-Party Codefendants
1996–2016



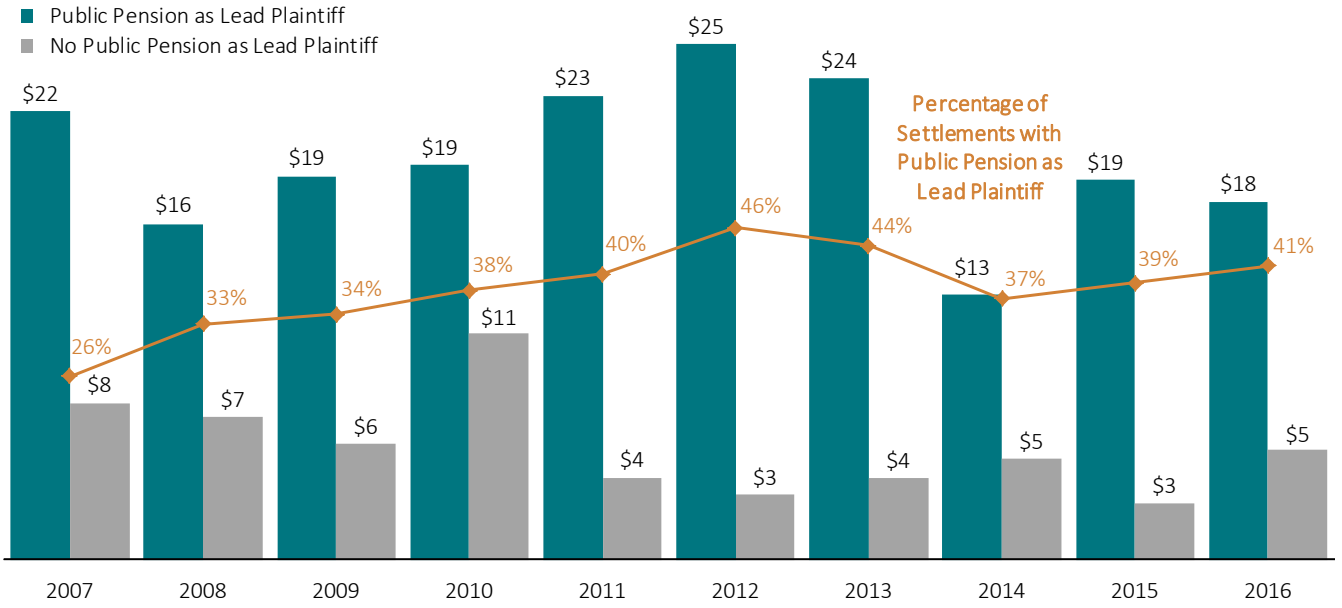
## Institutional Investors

- In 2016, the median settlement amount for cases with institutional investor lead plaintiffs was more than two-and-a-half times that of cases with no institutional investor as a lead plaintiff, but settlements as a percentage of "estimated damages" were only slightly higher.
- Institutions, including public pension plans—a subset of institutional investors—tend to be involved as plaintiffs in larger cases (i.e., cases with higher "estimated damages").
- In 2016, 55 percent of settlements with "estimated damages" greater than $500 million involved a public pension plan as lead plaintiff, compared to 30 percent for cases with "estimated damages" of $500 million or less.
- Cases in which public pension plans serve as lead or co-lead plaintiff also tend to involve larger issuer defendants, longer class periods, securities in addition to common stock, accounting allegations, and other indicators of more serious cases such as criminal charges. These cases are also associated with longer periods to reach settlement.

*Public pension involvement rose for the second consecutive year.*

Figure 13: Median Settlement Amounts and Public Pensions
2007–2016

(Dollars in Millions)



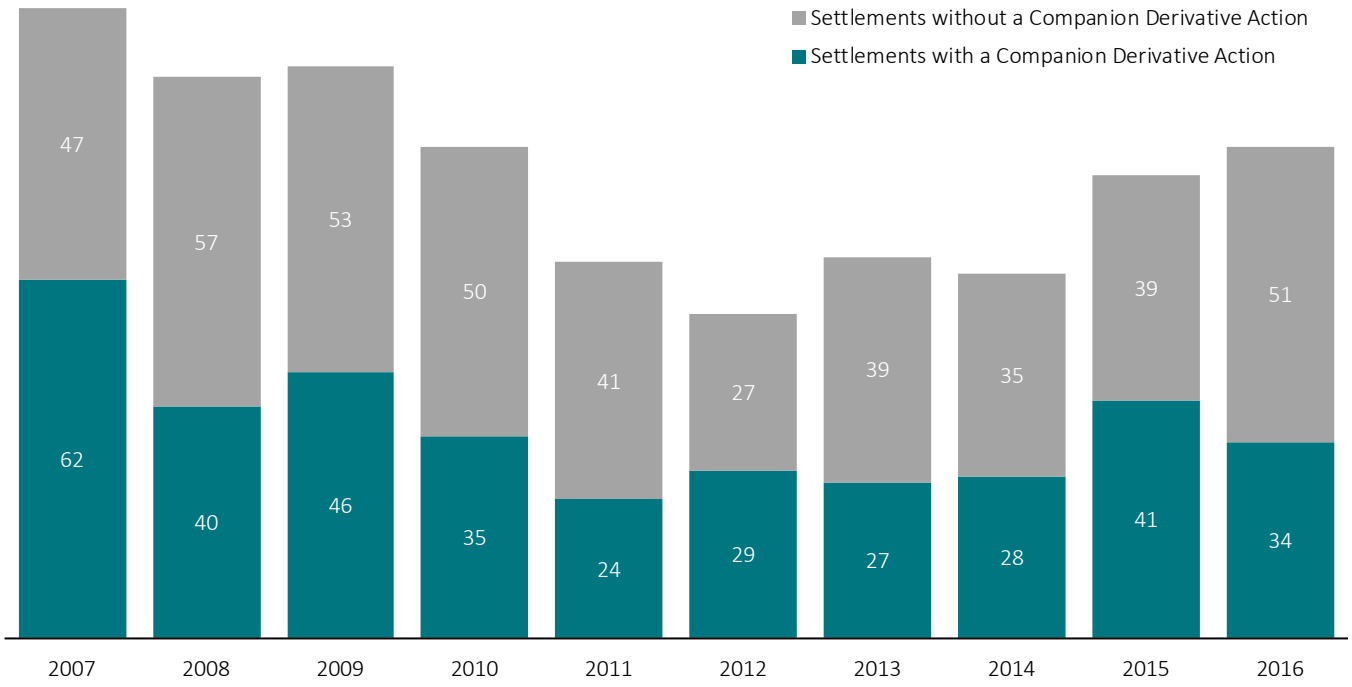

Note: Settlement dollars are adjusted for inflation; 2016 dollar equivalent figures are used.

## Derivative Actions

- In 2016, 40 percent of settled cases were accompanied by derivative actions, compared to 34 percent for all prior post–Reform Act years.
- Historically, accompanying derivative actions have been associated with relatively large securities class actions.[9] In 2016, however, 38 percent of cases with "estimated damages" of $500 million or less involved a companion derivative action—just below the 42 percent of cases with "estimated damages" of more than $500 million.
- As a percentage of all derivative actions, the prevalence of companion derivative actions filed in California has increased annually from 14 percent in 2012 to 35 percent in 2016..

*In 2016, the median settlement for a case with a companion derivative action was $12 million versus $8.5 million for those without.*

Figure 14: Frequency of Derivative Actions
2007–2016



## Corresponding SEC Actions

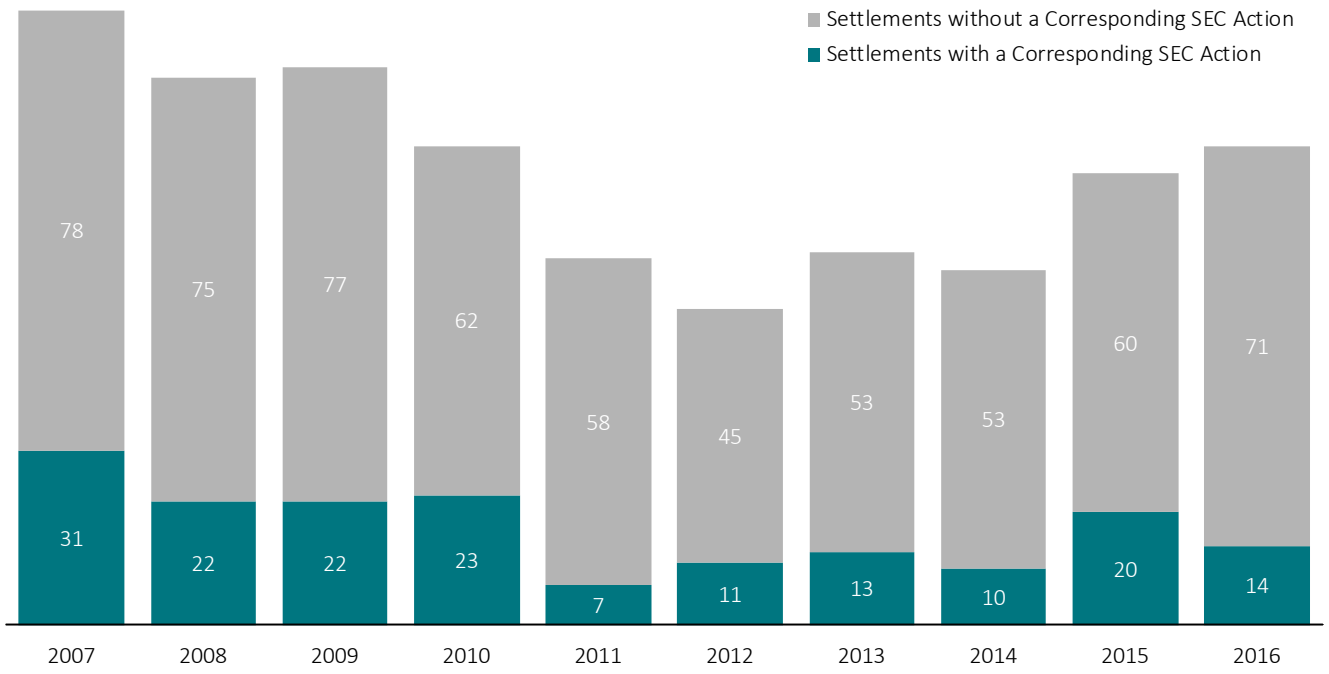
Cases with a corresponding SEC action related to the allegations (evidenced by the filing of a litigation release or administrative proceeding prior to settlement) are typically associated with significantly higher settlement amounts and have higher settlements as a percentage of "estimated damages."[10]

For related research on SEC enforcement activity, see t Securities Enforcement Empirical Database (SEED).[11]

- In 2016, however, the median settlement for cases with an SEC action ($8.4 million) differed only slightly from the median settlement for cases without a corresponding SEC action ($8.6 million).
- Across all post–Reform Act cases, for settlements of cases involving accompanying SEC actions, the issuer defendant's assets have averaged $65 billion, as compared to only $18 billion for settlements without accompanying SEC actions.
- While cases with accompanying SEC actions tend to involve larger issuer defendants, they are also more frequently associated with delisted firms. In addition, these cases often involve settlements prior to the first ruling on a motion to dismiss.

*After doubling in 2015, the number of 2016 settlements with a corresponding SEC action returned to the lower levels observed for 2012–2014.*

Figure 15: Frequency of SEC Actions
2007–2016



# Time to Settlement and Case Complexity

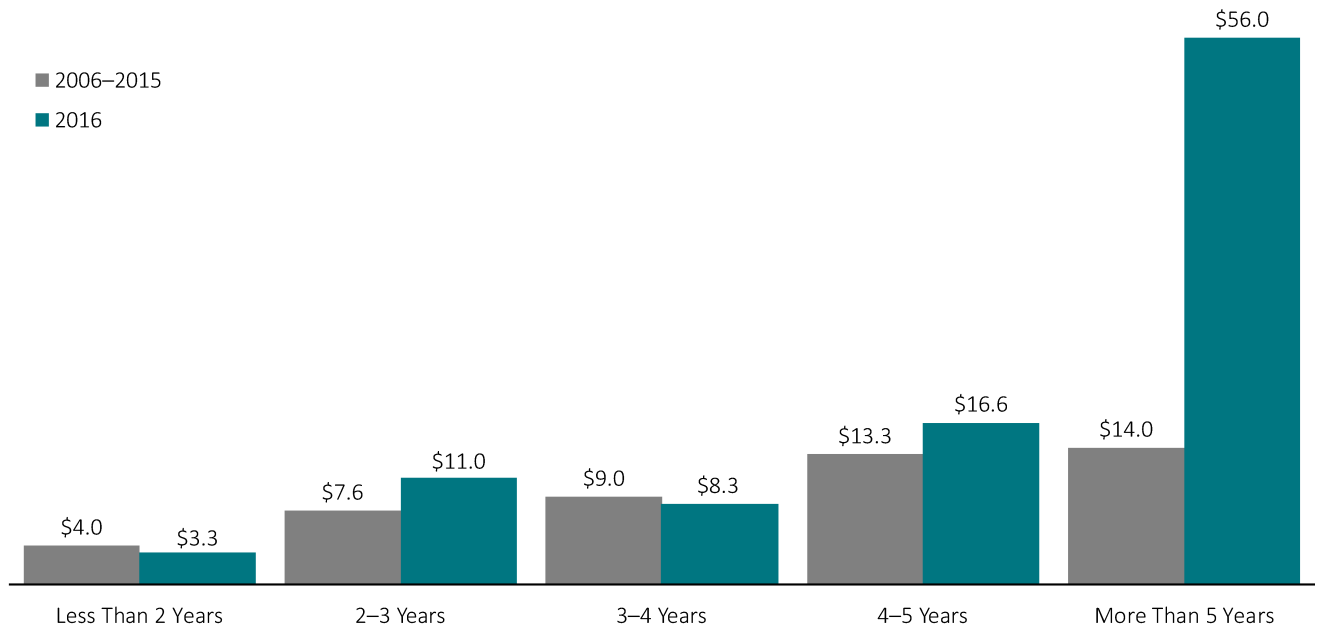
- The percentage of settlements in 2016 occurring within two years after the filing date was at its highest level in the last 10 years.
- The median number of docket entries for cases settling within two years in 2016 was 19 percent higher than the median for the prior 10 years, indicating a relatively high level of activity during the tenure of these cases.

*In 2016, the median time from filing date to settlement was less than three years.*

- In 2016, the median settlement for cases settling within two years was 70 percent lower than for cases taking longer to settle.
- The spike in the median settlement for 2016 cases settling after five years from filing is driven, in large part, by five mega settlements out of the 14 settlements in this category.
- Overall, the time to settlement tends to be longer for larger cases (as measured by issuer defendant size and "estimated damages"), cases involving third-party defendants, and cases with distressed issuer firms.

Figure 16: Median Settlement by Duration from Filing Date to Settlement Hearing Date

(Dollars in Millions)




Note: Settlement dollars are adjusted for inflation; 2016 dollar equivalent figures are used.

# Litigation Stages

This report studies three stages in the litigation process that may be considered an indication of the strength of the merits of a case (e.g., surviving a motion to dismiss) and/or the time and effort invested by the lead plaintiff counsel:

Stage 1: Settlement before the first ruling on a motion to dismiss

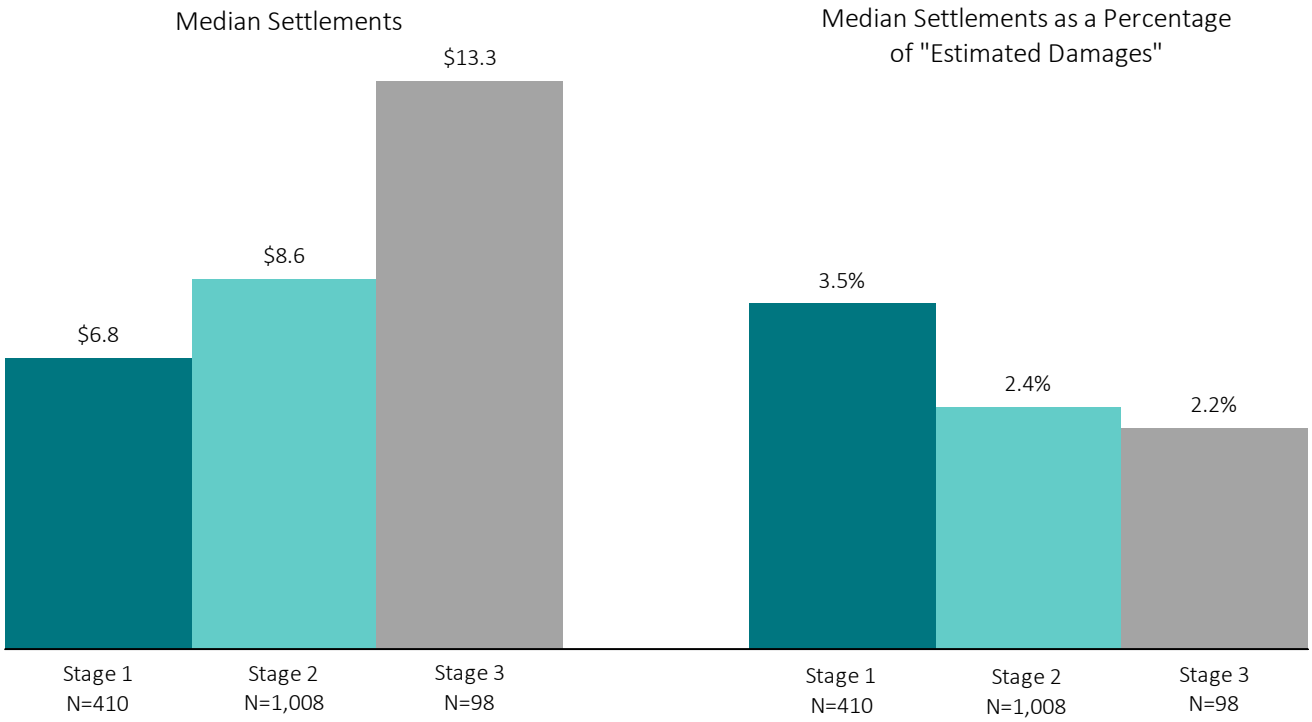
Stage 2: Settlement after a ruling on motion to dismiss, but before a ruling on motion for summary judgment

Stage 3: Settlement after a ruling on motion for summary judgment

- In 2016, 25 percent of settlements occurred in Stage 1, an increase from 18 percent for cases settled in 2015.
- Among all post–Reform Act settlements, cases settling in Stage 1 have the smallest median "estimated damages" and the smallest median assets whereas Stage 3 settlements have the highest medians.
- Public pensions are involved as lead plaintiffs in 17 percent of cases that settle in Stage 1 and in 30 percent of cases that settle in Stage 3.

*Higher settlement amounts but lower settlements as a percentage of "estimated damages" are associated with cases settling after a ruling on motion for summary judgment.*

Figure 17: Litigation Stages
2007–2016
(Dollars in Millions)




Note: Settlement dollars are adjusted for inflation; 2016 dollar equivalent figures are used.

# Cornerstone Research's Settlement Prediction Analysis

This research applies regression analysis to examine which characteristics of securities cases were associated with settlement outcomes. The regression analysis is designed to better understand and predict the total settlement amount, given the characteristics of a particular securities case. This analysis can also be applied to estimate the probabilities associated with reaching alternative settlement levels as well as to explore hypothetical scenarios, including, but not limited to, the effects on settlement amounts given the presence or absence of particular factors found to significantly affect settlement outcomes.

- Settlements were higher when "estimated damages," DDL, defendant asset size, or the number of docket entries were larger.
- Settlements were also higher in cases involving intentional misstatements or omissions in the issuer's financial statements, financial restatements, a corresponding SEC action, a codefendant underwriter and/or auditor, an accompanying derivative action, a public pension involved as lead plaintiff, a noncash component to the settlement, filed criminal charges, or securities other than common stock alleged to be damaged.
- Settlements were lower if the settlement occurred in 2009 or later, if the issuer was distressed, or if the issuer traded on a non-major exchange.

## Determinants of Settlement Outcomes

Based on the research sample of post–Reform Act cases that settled through December 2016, the factors that were important determinants of settlement amounts included the following:

- "Estimated damages"
- Disclosure Dollar Loss (DDL)
- Most recently reported total assets of the defendant firm
- Number of entries on the lead case docket
- The year in which the settlement occurred
- Whether the issuer reported intentional misstatements or omissions in financial statements
- Whether a restatement of financials related to the alleged class period was announced
- Whether there was a corresponding SEC action against the issuer, other defendants, or related parties
- Whether the plaintiffs named an auditor and/or underwriter as a codefendant
- Whether the issuer defendant was distressed
- Whether a companion derivative action was filed
- Whether a public pension was a lead plaintiff
- Whether noncash components, such as common stock or warrants, made up a portion of the settlement fund
- Whether the plaintiffs alleged that securities other than common stock were damaged
- Whether criminal charges/indictments were brought with similar allegations to the underlying class action
- Whether the issuer traded on a non-major exchange

# Research Sample

- The database used in this report focuses on cases alleging fraudulent inflation in the price of a corporation's common stock (i.e., excluding cases with alleged classes of only bondholders, preferred stockholders, etc., and excluding cases alleging fraudulent depression in price and M&A cases).
- The sample is limited to cases alleging Rule 10b-5, Section 11, and/or Section 12(a)(2) claims brought by purchasers of a corporation's common stock. These criteria are imposed to ensure data availability and to provide a relatively homogeneous set of cases in terms of the nature of the allegations.
- The current sample includes 1,621 securities class actions filed after passage of the Reform Act (1995) and settled from 1996 through 2016. These settlements are identified based on a review of case activity collected by Securities Class Action Services LLC (SCAS).[12]
- The designated settlement year, for purposes of this report, corresponds to the year in which the hearing to approve the settlement was held.[13] Cases involving multiple settlements are reflected in the year of the most recent partial settlement, provided certain conditions are met.[14]

# Data Sources

In addition to SCAS, data sources include Dow Jones Factiva, Bloomberg, the Center for Research in Security Prices (CRSP) at University of Chicago Booth School of Business, Standard & Poor's Compustat, court filings and dockets, SEC registrant filings, SEC litigation releases and administrative proceedings, LexisNexis, and public press.

# Endnotes

1 *Securities Class Action Filings—2016 Year in Review*, Cornerstone Research, 2017.

2 The simplified "estimated damages" model is applied to common stock only. For all cases involving Rule 10b-5 claims, damages are calculated using a market-adjusted, backward-pegged value line. For cases involving only Section 11 and/or Section 12(a)(2) claims (1933 Act Claims), damages are calculated using a model that caps the purchase price at the offering price. Volume reduction assumptions are based on the exchange on which the issuer's common stock traded. Finally, no adjustments for institutions, insiders, or short sellers are made to the underlying float.

3 The dates used to identify the applicable inflation bands may be supplemented with information from the operative complaint at the time of settlement.

4 Tiered damages are calculated for cases that settled after 2005. The calculation of tiered damages utilizes a single value line when there is one alleged corrective disclosure date (at the end of the class period) or a tiered value line when there are multiple dates identified in the settlement notice.

5 This measure does not incorporate additional stock price declines during the alleged class period that may affect certain purchasers' potential damages claims. As this measure does not isolate movements in the defendant's stock price that are related to case allegations, it is not intended to represent an estimate of investor losses. The DDL calculation also does not apply a model of investors' share-trading behavior to estimate the number of shares damaged.

6 Intensified activity in the U.S. IPO market in recent years, in tandem with the increase in Section 11 filings (either alone or together with Rule 10b-5 claims), suggests that these cases are likely to be more prevalent in the near future. However, a slowdown in IPO activity reported in 2016 may eventually contribute to a reduction in '33 Act claim only cases.

7 See *Securities Class Action Filings—2016 Year in Review,* Cornerstone Research, 2017, page 4.

8 The three categories of accounting issues analyzed in this report are: (1) GAAP violations—cases with allegations involving Generally Accepted Accounting Principles (GAAP); (2) restatements—cases involving a restatement (or announcement of a restatement) of financial statements; and (3) accounting irregularities—cases in which the defendant has reported the occurrence of accounting irregularities (intentional misstatements or omissions) in its financial statements.

9 This is true whether or not the settlement of the derivative action coincides with the settlement of the underlying class action, or occurs at a different time.

10 It could be that the merits in such cases are stronger, or simply that the presence of an accompanying SEC action provides plaintiffs with increased leverage when negotiating a settlement.

11 The Securities Enforcement Empirical Database (SEED) tracks and records information for SEC enforcement actions filed against public companies traded on major U.S. exchanges and their subsidiaries. Created by the NYU Pollack Center for Law & Business in cooperation with Cornerstone Research, SEED facilitates the analysis and reporting of SEC enforcement actions through regular updates of new filings and settlement information for ongoing enforcement actions.

12 Available on a subscription basis.

13 Movements of partial settlements between years can cause differences in amounts reported for prior years from those presented in earlier reports.

14 This categorization is based on the timing of the settlement approval. If a new partial settlement equals or exceeds 50 percent of the then-current settlement fund amount, the entirety of the settlement amount is re-categorized to reflect the settlement hearing date of the most recent partial settlement. If a subsequent partial settlement is less than 50 percent of the then-current total, the partial settlement is added to the total settlement amount and the settlement hearing date is left unchanged.

# Appendices

## Appendix 1: Settlement Percentiles

(Dollars in Millions)

| | Average | 10th | 25th | Median | 75th | 90th |
|---|---|---|---|---|---|---|
| 2016 | $70.5 | $1.9 | $4.2 | $8.6 | $33.0 | $146.0 |
| 2015 | $38.4 | $1.3 | $2.1 | $6.1 | $15.5 | $92.1 |
| 2014 | $18.5 | $1.7 | $2.9 | $6.1 | $13.4 | $50.7 |
| 2013 | $74.5 | $2.0 | $3.1 | $6.7 | $22.8 | $85.0 |
| 2012 | $64.0 | $1.3 | $2.8 | $9.8 | $37.1 | $120.2 |
| 2011 | $22.4 | $2.0 | $2.7 | $6.1 | $19.2 | $44.6 |
| 2010 | $39.2 | $2.2 | $4.7 | $12.4 | $27.5 | $87.6 |
| 2009 | $42.0 | $2.6 | $4.3 | $9.0 | $22.4 | $74.3 |
| 2008 | $31.8 | $2.2 | $4.2 | $8.9 | $21.2 | $56.2 |
| 2007 | $76.9 | $1.7 | $3.4 | $10.4 | $20.3 | $92.4 |
| 1996–2016 | $43.7 | $1.7 | $3.5 | $8.3 | $20.9 | $74.0 |

Note: Settlement dollars are adjusted for inflation; 2016 dollar equivalent figures are used.

## Appendix 2: Select Industry Sectors 1996–2016

(Dollars in Millions)

| Industry | Number of Settlements | Median Settlement | Median "Estimated Damages" | Median Settlement as a Percentage of "Estimated Damages" |
|---|---|---|---|---|
| Technology | 361 | $7.8 | $324.9 | 2.8% |
| Financial | 195 | $14.5 | $812.8 | 2.5% |
| Telecommunications | 151 | $9.1 | $501.8 | 2.2% |
| Retail | 131 | $7.1 | $246.7 | 3.8% |
| Pharmaceuticals | 125 | $8.3 | $387.6 | 2.4% |
| Healthcare | 64 | $8.6 | $296.1 | 3.3% |

Note: Settlement dollars and "estimated damages" are adjusted for inflation; 2016 dollar equivalent figures are used. "Estimated damages" are adjusted for inflation based on class period end dates.

Appendix 3: Settlements by Federal Circuit Court
2007–2016

(Dollars in Millions)

| Circuit | Number of Settlements | Median Number of Docket Entries | Median Settlement | Median Settlement as a Percentage of "Estimated Damages" |
|---|---|---|---|---|
| First | 34 | 143 | $7.0 | 2.6% |
| Second | 204 | 117 | $11.9 | 2.1% |
| Third | 76 | 113 | $9.0 | 2.2% |
| Fourth | 33 | 137 | $8.3 | 1.8% |
| Fifth | 44 | 104 | $6.6 | 2.0% |
| Sixth | 38 | 140 | $19.8 | 3.1% |
| Seventh | 44 | 146 | $10.2 | 2.7% |
| Eighth | 20 | 195 | $10.7 | 3.3% |
| Ninth | 206 | 164 | $7.9 | 2.2% |
| Tenth | 23 | 153 | $8.4 | 1.6% |
| Eleventh | 53 | 134 | $5.2 | 2.2% |
| DC | 3 | 267 | $48.1 | 5.0% |

Note: Settlement dollars and "estimated damages" are adjusted for inflation; 2016 dollar equivalent figures are used. "Estimated damages" are adjusted for inflation based on class period end dates.

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Laarni Bulan is a principal in Cornerstone Research's Boston office, where she specializes in finance. Her work has focused on securities damages and class certification issues, insider trading, merger valuation, risk management, market manipulation and trading behavior, and real estate markets. She has consulted on cases related to financial institutions and the credit crisis, municipal bond mutual funds, asset-backed commercial paper conduits, credit default swaps, foreign exchange, and securities clearing and settlement. Dr. Bulan has published several academic articles in peer-reviewed journals. Her research covers topics in dividend policy, capital structure, executive compensation, corporate governance, and real options. Prior to joining Cornerstone Research, Dr. Bulan had a joint appointment at Brandeis University as an assistant professor of finance in its International Business School and in the economics department.

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Laura Simmons is a senior advisor with Cornerstone Research. She is a certified public accountant (CPA) and has more than 25 years of experience in accounting practice and economic and financial consulting. Dr. Simmons has focused on damages and liability issues in litigation, as well as on accounting issues arising in a variety of complex commercial litigation matters. She has served as a testifying expert in cases involving accounting analyses, securities case damages, research on securities lawsuits, and other issues involving empirical analyses.

Dr. Simmons's research on pre– and post–Reform Act securities litigation settlements has been published in a number of reports and is frequently cited in the public press and legal journals. She has spoken at various conferences and appeared as a guest on CNBC addressing the topic of securities case settlements. She has also published in academic journals, with recent research focusing on the intersection of accounting and litigation. Dr. Simmons was previously an accounting faculty member at the Mason School of Business at the College of William & Mary. From 1986 to 1991, she was an accountant with Price Waterhouse.

The authors acknowledge the research efforts and significant contributions of their colleagues at Cornerstone Research. Please direct any questions and requests for additional information to the settlement database administrator at settlement.database@cornerstone.com.

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