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Recent Trends in Shareholder Class Action Litigation: Beyond the Mega-Settlements, is Stabilization Ahead?

Ronald I. Miller, Ph.D., Todd Foster, Elaine Buckberg, Ph.D.¹

April 2006

Top Ten Shareholder Class Action Settlements

As of March 1, 2006

Ranking	Company	Year	Settlement Value (\$MM)
1	Enron Corp.*	2005	\$7,144
2	WorldCom, Inc.	2005	6,156
3	Cendant Corp.**	2000	3,528
4	AOL Time Warner Inc.*	2006	2,650
5	Nortel Networks***	2006	2,474
6	Royal Ahold, NV***	2006	1,100
7	McKesson HBOC Inc.***	2005	960
8	Lucent Technologies, Inc.	2003	517
9	BankAmerica Corp.; NationsBank Corp.	2002	490
10	Dynegy Inc.	2005	474

* This is a partial settlement including only some defendants.

** The settlement value incorporates a \$341 million settlement in the Cendant PRIDES case.

*** This is a tentative settlement.

Settlement Records Keep Toppling

With CIBC's \$2.4 billion settlement, the total settlement pool for the Enron shareholder class action became the largest ever at \$7.1 billion, passing the \$6.2 billion mark set by WorldCom only months earlier.² CIBC's contribution exceeded its 2004 earnings. Because some of the other Enron defendants, including more of Enron's bankers, have not yet reached settlements the final tally may rise much higher. The Enron settlement, though still incomplete, nearly doubles the pre-2005 record in Cendant, which reached \$3.5 billion.³ In the remarkable cases of both Enron and WorldCom, outside co-defendants have financed nearly the whole settlement.

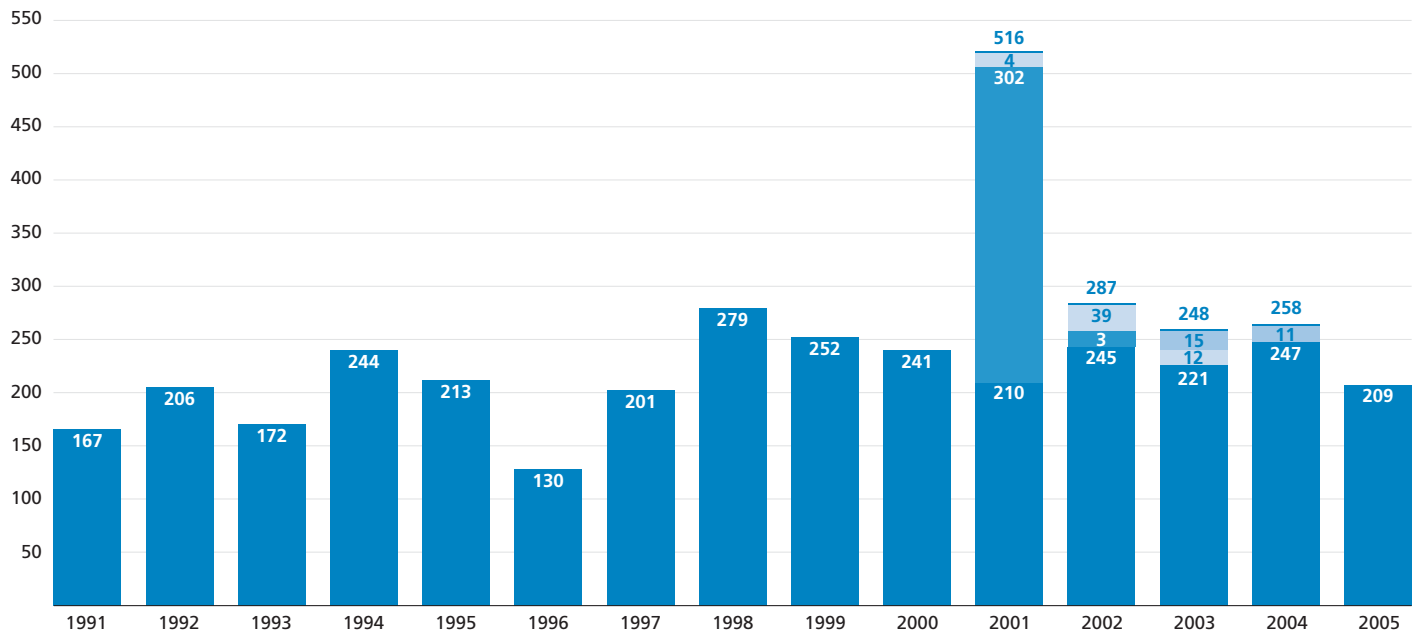
The WorldCom and Enron settlements share a common characteristic of the recent mega-settlements: they compensate enormous investor losses. In the case of WorldCom, the investor losses are larger by a substantial multiple than for any other settled case filed since 1991. Investor losses, a simplified plaintiffs' style measure of damages, is the single most powerful predictor of settlement size.⁴ The recent huge settlements have been associated with huge losses.

In 2005 and the first two months of 2006, the list of the ten largest shareholder class action settlements was almost completely rewritten. Seven slots on the list are now filled by 2005 and 2006 settlements. As of 2004, Cendant was the only settlement larger than one billion dollars. Now there are six. In what will surely be chilling news to non-United States issuers already wary of being embroiled in U.S. litigation, two of those six settlements, those of Nortel Networks of Canada and Royal Ahold N.V. of the Netherlands, involved foreign companies.⁵ The Nortel settlement exceeds the previous record for a foreign issuer, Daimler-Chrysler, by a factor of more than eight.

Federal Filings

January 1991 – December 2005

Standard Filings Laddering Cases Analyst Cases Market Timing Cases



Filings Fall in 2005: A Dip or a Trend?

In 2005, plaintiffs filed 209 cases in Federal Courts, substantially fewer than the 247 standard filings in 2004 and the post-Private Securities Litigation Reform Act (“PSLRA”) average of 238 standard filings each year.⁶ This is the lowest number of federal filings since 1997, when filings were depressed by a move to state courts by plaintiffs seeking to avoid the constraints of the PSLRA.

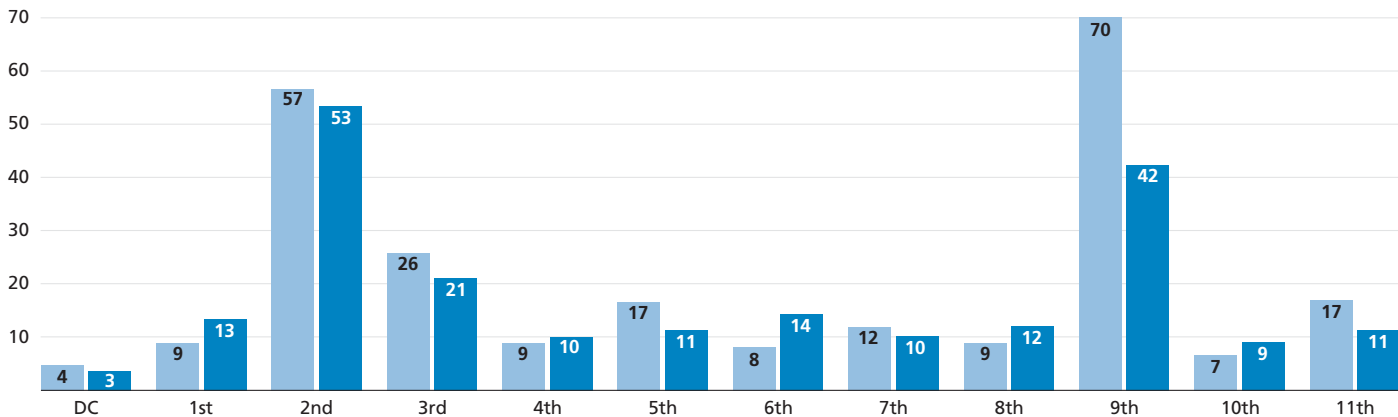
The low rate of filings in 2005 is evidence that the surge in filings that started in the late 1990s has lost momentum, but it is far too early to conclude that there is a downward trend. First, statistical testing finds that the 2005 dip is not statistically different from either the post-PSLRA average or from a longer-term trend. Second, the drop is far from evenly distributed: almost all of the difference between the 2004 and 2005 totals is accounted for by a sharp fall in filings in the Ninth Circuit.

One possible cause of this drop is that Sarbanes-Oxley (“SOX”), passed in July 2002, has had enough time to induce an improvement in corporate governance, prevented fraud, and thus reduced the number of resulting shareholder class actions. But if the beneficial effects of SOX were really the root cause of the slowdown in filings, we would have expected the fall in filings to be much more evenly distributed across the circuits. It seems unlikely that corporate governance was much more improved on the West Coast than in the rest of the country. Some of the drop may be accounted for by the collapse of the high-tech bubble. Reflecting the mix of industries on the West Coast, many Ninth Circuit filings are against issuers in high-tech industries. There has been some drop in filings against high-tech issuers as compared to 2004, but insufficient to explain the overall drop in filings. The most likely explanation for the remainder of the drop is simply random year-to-year variation.

Standard Federal Filings By Circuit

2004 vs. 2005

■ 2004 ■ 2005



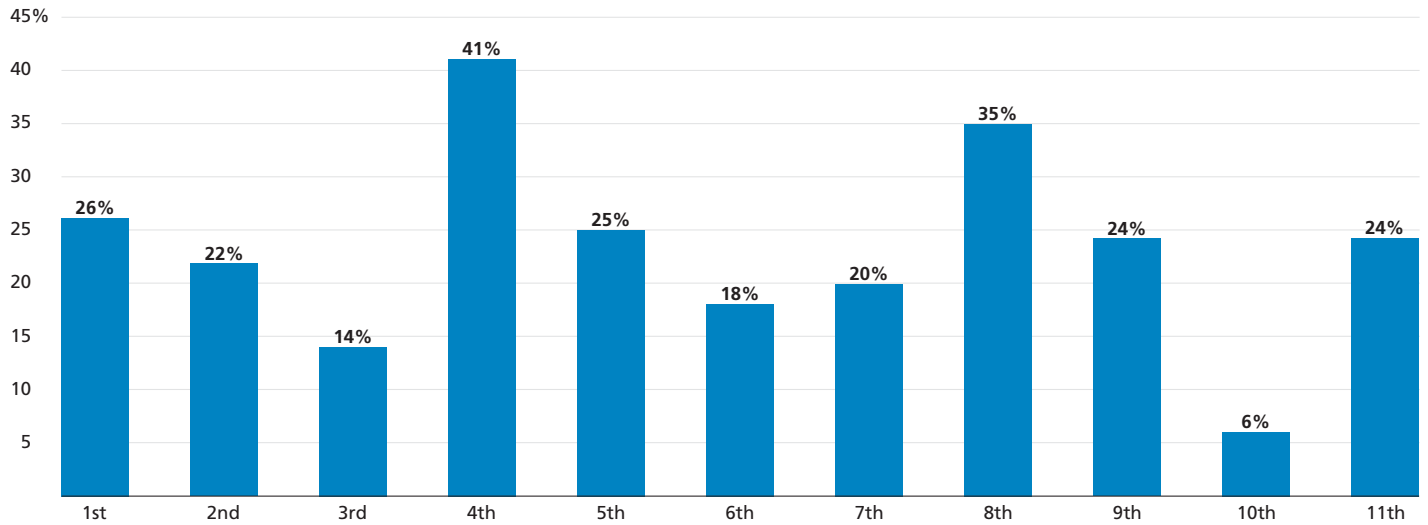
Based on the 2003–2005 filing rate, we estimate that over a five-year period, the average public corporation has nearly a 10% probability that it will face at least one shareholder class action lawsuit.⁷ The annual likelihood of a suit has risen approximately 8% from pre-PSLRA levels, from 1.8% to 1.9%. However, the increased likelihood of a suit is more than offset by the increased dismissal rate. The probability of a company facing a suit that survives a motion to dismiss has fallen from 1.4% in 1993–1995 to 1.2% over 2003–2005.

There has been some drop in filings against high-tech issuers as compared to 2004, but insufficient to explain the overall drop in filings.

Companies Face a 2% Chance of Suit Each Year

	1993–1995	2003–2005	Change
No. of Publicly Traded Companies	11,688	12,287	5.1%
Annual Filings	210	238	13.7%
Probability of Shareholder Class Action (SCA)	1.8%	1.9%	8.1%
Probability of Dismissal	19.4%	40.3%	107.7%
Probability of SCA that Survives Motion to Dismiss	1.4%	1.2%	-19.9%

Dismissal Rates By Circuit Within Two Years Of Filing



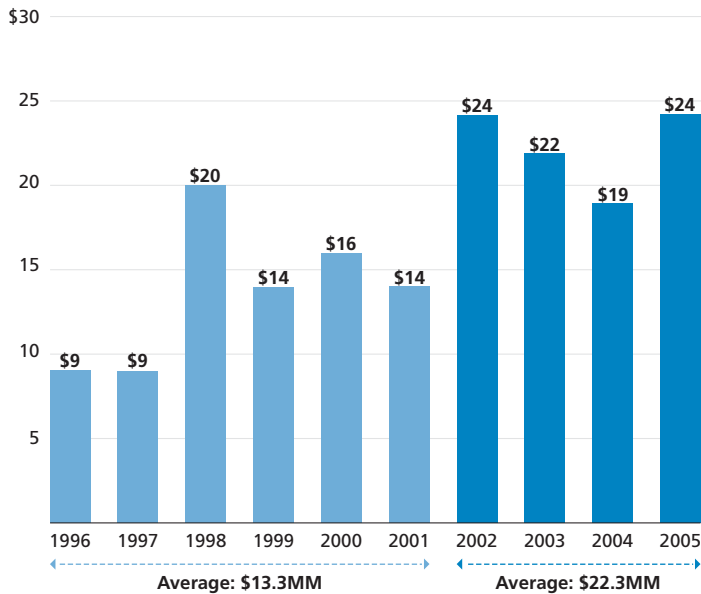
Dismissals

Dismissal rates have doubled since PSLRA.⁸ Dismissals accounted for only 19.4% of dispositions for cases filed between 1991 and 1995. More recently, for cases filed between 1998 and 2003, dismissals have accounted for 40.3% of dispositions.⁹ Our post-PSLRA dismissal rate may be slightly overstated, as it may include some dismissals without prejudice that will be reversed by amended and better-pled complaints or dismissals with prejudice that will be successfully appealed. There is no indication that dismissal rates have continued to rise after an initial adjustment to the tougher pleading provisions of PSLRA.

Dismissal rates vary by circuit. Both the Second and Ninth Circuits, which together receive the majority of cases, dismiss approximately 25% of cases within two years of the filing date. The Fourth Circuit has the highest rate, dismissing more than 40% of filings within two years.

Although high, it appears that settlements have reached a plateau as opposed to being on a continually rising trend.

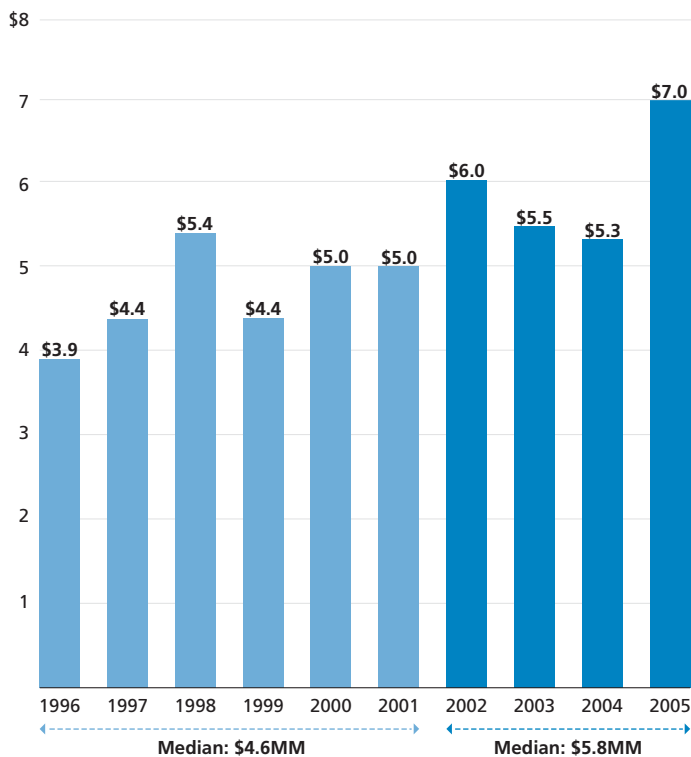
Average Settlement Value (\$MM)



Settlements Reached New Highs in 2005

Average settlement values hit a new peak in 2005, even excluding WorldCom and Enron.¹⁰ The mean settlement value reached \$24.3 million, barely exceeding the prior high of \$23.7 million in 2002.¹¹ Including WorldCom would bring the average to nearly \$71 million. Although high, with the addition of the results from 2005 it appears that settlements have reached a plateau that began in 2002 as opposed to being on a continually rising trend. Just as for filings, for average settlements there is some stabilization occurring, underneath the biggest of the mega-settlements.

Median Settlement Value (\$MM)



The Median Settlement Surged

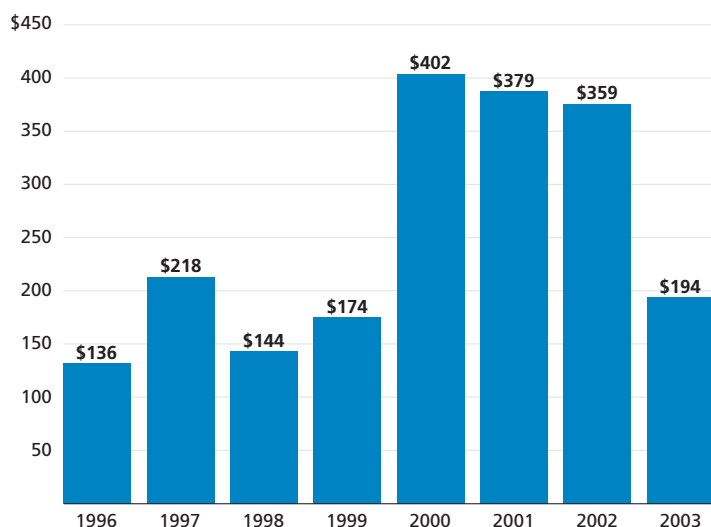
Median settlement values in 2005 hit \$7.0 million, exceeding the past record by more than 15% and the 2004 level by one-third. The average settlement value tends to be dominated by the very largest settlements, while the median is more descriptive of typical cases. The driving factor behind this increase is the sharp reduction in settlements under \$3 million, which accounted for nearly 45% of settlements in 1996 but constituted only 27% of settlements in 2005.

Settlements May Fall From Their Peak

There is good reason to expect that, apart from the biggest of the mega-settlements, average settlements will not rise further over the next two or three years and, instead, could even fall. Our analysis indicates that the high value of settlements in 2002–2005 is due to higher investor losses, not due to changes in the litigation environment. Many of the largest suits in this recent period have class periods ending during the collapse of the stock market bubble in 2000–2002. The large market losses that came with the end of this bubble have led to large settlements.

Median investor losses for cases with class periods ending in 2000-2002 are far higher than for any other period, peaking at \$402 million in 2000.

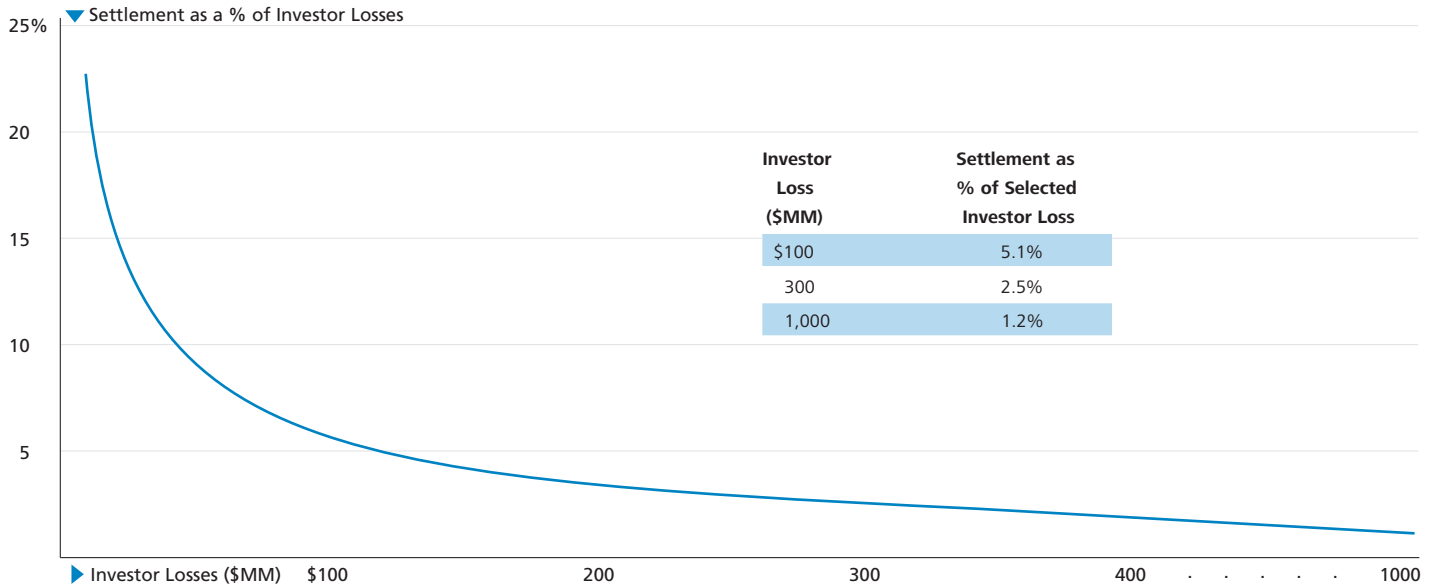
Median Investor Losses
By End-of-Class Period Year (\$MM)



The high settlements of recent years are likely to continue for several more years, as cases from the bear market proceed to settlement. Our analysis of median investor losses by end-of-class-period year for settled cases shows the point. Median investor losses for cases with class periods ending in 2000–2002 are far higher than for any other period, peaking at \$402 million for class periods ending in 2000. For settled cases with class periods ending in 2003, of which there are 40 through 2005, median investor losses are only \$194 million. As time passes we expect to see more settlements with more recent class periods which are likely to be smaller than those from the end of the bubble. But the backlog of earlier cases will keep settlements high for at least a few more years.

We find no statistically significant change in settlement values since the passage of Sarbanes-Oxley, once we control for other factors including investor losses.¹² Higher investor losses explain the rise in settlements, as we will discuss further below.

Expected Settlements Rise More Slowly Than Investor Losses (\$MM)



Explaining Settlements

NERA has estimated a statistical model for predicting settlements that explains over 60% of the variation in settlements, using data on cases filed after 1 January 1996. This model allows us to assess the impact of various lawsuit characteristics on settlement values. All the sensitivity measures described below are calculated controlling for other characteristics of the suit and consumer price inflation.

If the defendant firm is in bankruptcy or has a stock price of less than \$1 per share at settlement, the settlement will typically be approximately 25% lower.

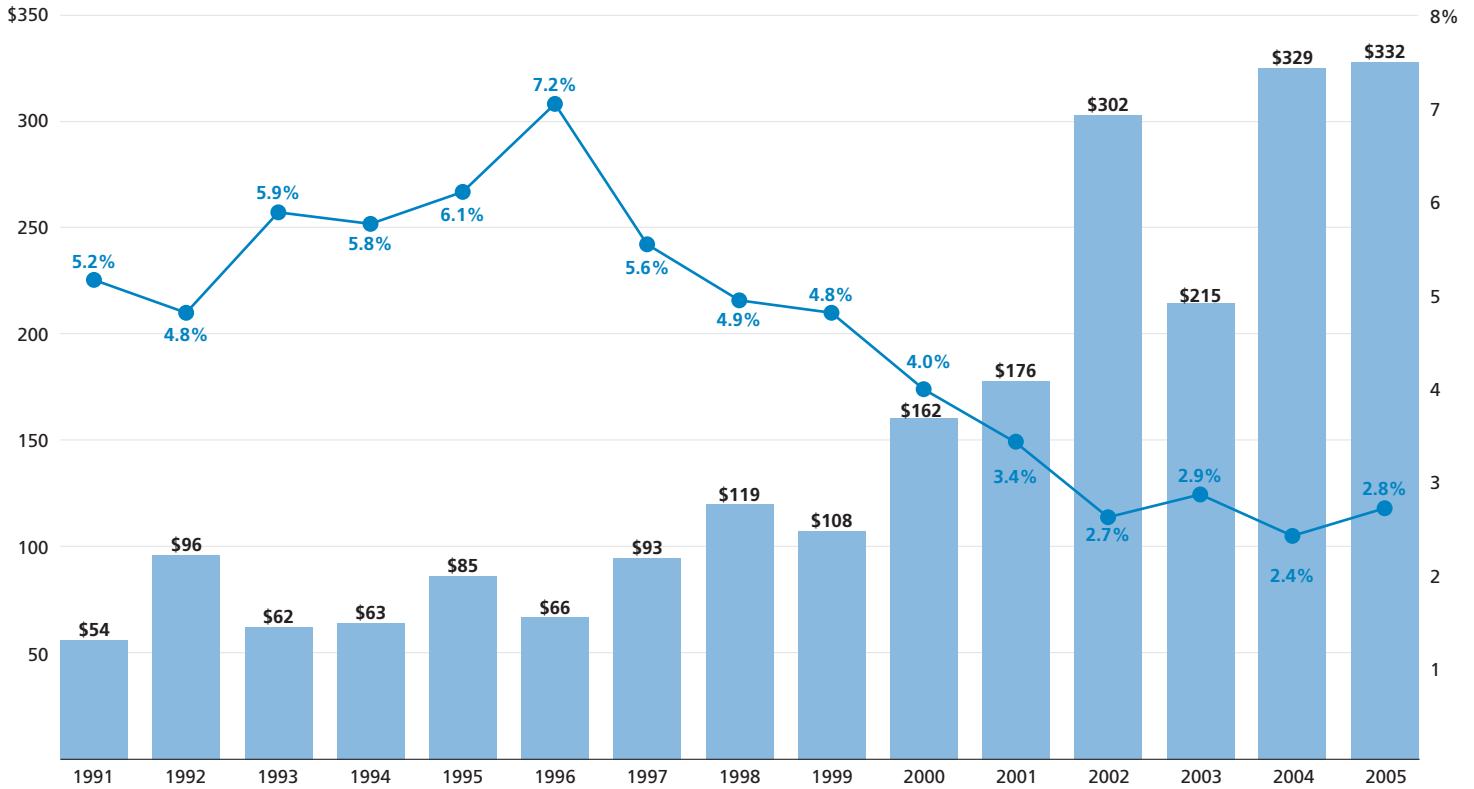
By far the biggest single driver of settlement values is investor losses, a measure of what investors lost over a class period relative to an investment in the S&P500. High investor losses in recent years completely explain the high average settlements we have seen. On average, a 1.0% increase in investor losses results in an approximately 0.4% increase in the size of the expected settlement, meaning that as investor losses rise, the ratio of settlement to investor losses falls.¹³

In 1996, the investor losses in an average settled suit were only \$140 million. By 2005, average investor losses had ballooned to \$2.6 billion. As well, median investor losses have been rising rapidly since 1996 and set a new record in 2005 at \$332 million. But that was only a shade above the 2004 median of \$329 million. Investor losses appear to be stabilizing, consistent with our analysis by end-of-class period. Similarly, the median share of settlements to investor losses also appears to be stabilizing after a long declining trend: in the early 1990s the median share was in excess of 5%, but since 2002 it has hovered between 2.5% and 3.0%.

Our investor loss measure covers only losses faced by holders of common stock. Settlement values increase dramatically in cases in which holders of other classes of securities—bonds, options, preferred stock—share in the settlement. Effectively, the claims of the holders of these other securities represent losses above and beyond those measured by investor losses.

Investor Losses Have Risen More Rapidly Than Settlements—But May Be Stabilizing

■ Median Investor Losses (\$MM) ● Median Ratio of Settlement to Investor Losses



Settlements are greater when defendants have deeper pockets. For each 1% increase in the company’s market capitalization on the day after the end of the class period, the typical settlement will increase by more than 0.1%. If the company’s fortunes change before settlement, there may be less money to go around. If the defendant firm is in bankruptcy or has a stock price of less than \$1 per share at settlement, the settlement will typically be approximately 25% lower. In addition, the involvement of outside co-defendants can lead to larger settlements. In cases with an accounting firm co-defendant, settlements increase by more than three-quarters, controlling for all other characteristics of the case.

Cases with accounting allegations result in higher settlements for other reasons too. The presence of allegations regarding accounting issues will raise average settlement values by approximately 20%. Settlements in cases in which accounting irregularities are admitted increase by a further half.

When the allegations of a suit are subject to official investigation, for example by the SEC or the New York Attorney General’s Office, or result in a consent agreement or official punishment; settlements are higher. This outside evidence of the merits of a case leads to an approximately 25% increase in expected settlement value.

One of Congress’s major goals for the PSLRA was to involve institutional investors as lead plaintiffs. In this the PSLRA has been effective, though the effect has taken time. In 2000, 14% of settled cases had an institutional lead plaintiff. In 2005, the figure was 38%. Controlling for other case characteristics, cases with an institutional investor lead plaintiff settle for a statistically significant one-third more. It is possible that institutional investors are more likely to choose to be involved in cases with greater merit, although we are controlling for other easily observable features of the suit. Alternatively, institutional investors as lead plaintiffs may retain more effective counsel, supervise counsel more effectively, and provide an independent contribution to strategy.

Our model also indicates that settlements increase by more than one-third if an IPO is involved. All such cases involve potential Section 11 claims, which may result in higher alleged damages than the accompanying 10b-5 claims and are also governed by different liability standards.

Only the health services sector pays markedly different settlements than do other industries. Settlements involving companies in the health services sector are typically one-third higher than settlements involving any other industry, controlling for other case characteristics. This finding may relate to the existence of concurrent billing fraud allegations against health services companies brought under the federal False Claims Act.

Conclusion

The huge settlements from the Enron and WorldCom suits have grabbed attention in 2005, far surpassing any previous settlements. Another wave of mega-settlements has already begun in 2006. But for the greater mass of shareholder class action defendants, the situation appears to be stabilizing. We see evidence of stabilization in several key areas. An increase in federal filings followed passage of the PSLRA, but that trend has leveled. Average settlements reached a new high this year, but already cases with class periods ending after the end of the bubble-deflation are starting to bring the average down. Along with that leveling off, the share of settlements in investor losses has also stabilized after a long period of rapid decrease. It may be that for all the record-breaking settlements and all the headlines, shareholder class action litigation is entering a new period of normalcy.

End Notes

1 This edition of NERA's research on recent trends in shareholder class action litigation expands on previous work by our colleagues Lucy Allen, Frederick C. Dunbar, Vinita M. Juneja, Denise Neumann Martin, Stephanie Planchich and David I. Tabak. We gratefully acknowledge their contribution to previous editions as well as this current version. In addition, the authors thank Christopher Enright and Christopher Lyon for supervising the research effort. These individuals receive credit only for improving this paper; all errors and omissions are ours.

2 CIBC's settlement, as well as JPMorgan Chase's for \$2.2 billion and Citigroup's for \$2.0 billion, all in the Enron litigation, have not yet received court approval.

3 Including the \$341 million Cendant PRIDES settlement.

4 Investor losses are calculated in a standardized fashion and do not take into account the specific facts of any case apart from the stock price movements. Actual damages claimed by plaintiffs may be very different from investor losses in any particular case. Nonetheless, we have consistently found investor losses to be a powerful predictor of settlement values.

5 Neither of these settlements is yet court approved.

6 The post-PSLRA average is calculated for 1998-2005, thus excluding 1996 and 1997. There was a large drop in federal filings in 1996 and 1997, as plaintiffs filed in state courts to avoid the restrictions of PSLRA. As such, filings in those years are atypical. Standard filings are defined to exclude the laddering, analyst and mutual fund market timing cases.

7 The probability of not facing a suit is 97.9% per year. Assuming that the probability of facing a suit in each year is independent and compounding over five years yields a 90.7% chance of no suit, or a 9.3% chance of at least one suit, in five years.

8 Our dismissal statistics include summary judgments but exclude partial dismissals.

9 Because it is not uncommon for judges to take up to two years from the filing date to rule on motions to dismiss, it would be premature to evaluate dismissal rates of cases filed in 2004-2005. The increase in dismissals is statistically significant.

10 Enron is excluded because it is still incomplete and, for the purpose of calculating statistics, we date a settlement by the year it became complete and finalized.

11 Excluding Cendant from the 2000 average.

12 This is true for cases settled after SOX as well as for cases filed after SOX.

13 The illustrated figures represent the expected settlement as a percentage of investor loss, when all other predictive variables are at their mean levels. The expected settlement percentage may be very different for any particular settlement. NERA's statistical model of settlements allows calculation of the expected settlement percentage for individual cases with any specific set of characteristics.

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