

# Post-Reform Act Securities Settlements

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2005 Review and Analysis

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**POST-REFORM ACT SECURITIES SETTLEMENTS:  
2005 REVIEW AND ANALYSIS**

The year 2005 was a particularly notable one for securities case settlements. First, the year included announcements of two of the largest securities case settlements in history. Specifically, the total settlement fund in the WorldCom case reached over \$6.1 billion, while the total settlement fund in the Enron matter reached approximately \$7.1 billion.<sup>1</sup> Moreover, both settlements provide for payments from outside directors' personal assets (a rare event). Even excluding these two case settlements, the total value of cases settled during the year grew to an all-time high of \$3.5 billion. In addition, median and average settlement amounts also reached unprecedented high levels.<sup>2</sup>

This monograph discusses these and other findings in further detail, updating our prior reports on settlements of cases filed after passage of the Private Securities Litigation Reform Act (Reform Act). Our sample includes 735 class actions settled between 1997 and 2005.<sup>3</sup> Cases are limited to those including allegations of fraudulent inflation in the price of a corporation's common stock. These cases are identified from Institutional Shareholder Services' Securities Class Action Services (SCAS).

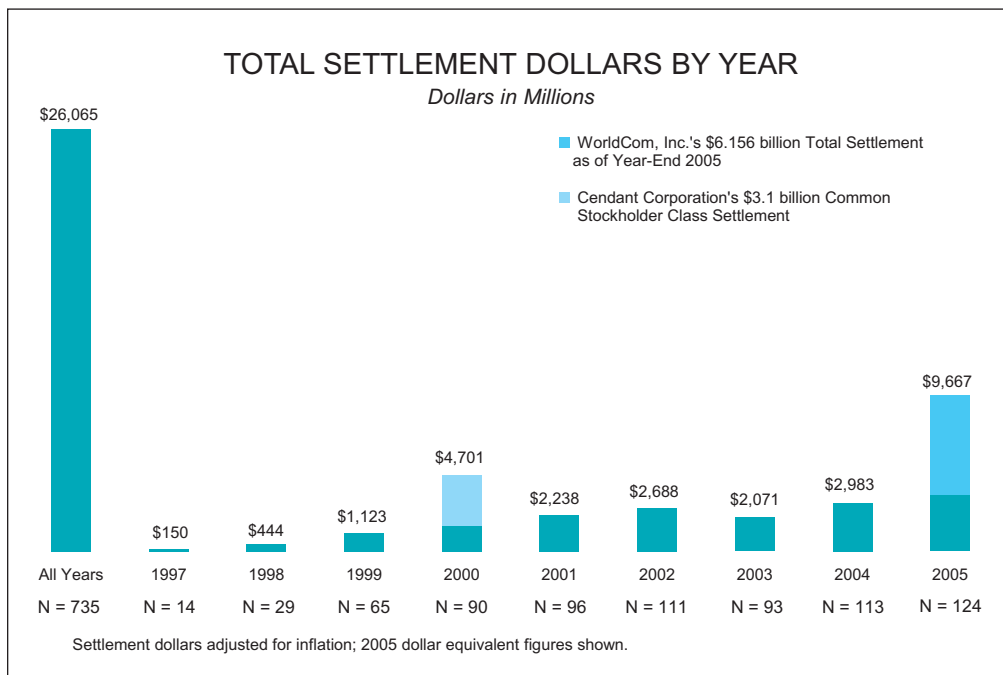


Figure 1

As shown above, 2005 was a record-breaking year in terms of the total value of cases settled. This increase was due to both a larger number of settlements occurring during the year and a higher average settlement size.<sup>4</sup> For purposes of our research, the designated settlement year corresponds to the year in which the hearing to approve the settlement was held. Cases that include multiple settlements are reflected in the year of the latest partial settlement.<sup>5</sup>



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The increase in settlement amounts in 2005 occurred not only in very large cases, but also for more typical cases. Figure 2 shows the increase in the median settlement amount to \$7.5 million from \$6.3 million for previous post-Reform Act years. The median represents the point at which half the data points are greater and half are smaller (i.e., the midpoint). We have never observed such a large single-year increase in the median settlement amount.

In spite of the increase in 2005, it is noteworthy that the median settlement amount still remains less than \$10 million.

	2005 Settlements Only	Post-Reform Act Settlements Through 2004
Minimum	\$437,000	\$117,300
Median	\$7.5 million	\$6.3 million
Average	\$28.5 million	\$21.1 million
Maximum	\$544.5 million	\$549.0 million
Total Amount	\$3.5 billion	\$12.8 billion

Settlement dollars adjusted for inflation; 2005 dollar equivalent figures shown. Statistics exclude the WorldCom settlement, totaling \$6.156 billion as of year-end 2005, and the Cendant Corporation settlement of \$3.1 billion in 2000. Including these cases, the average and total values are \$78.0 million and \$9.7 billion, respectively, for 2005 and \$26.8 million and \$16.4 billion, respectively, for all post-Reform Act cases through 2004.

Figure 2

Compared to previous years, Figure 3 shows a decline in 2005 in the percentage of smaller settlements (i.e., settlements less than \$10 million).

There were nine settlements in 2005 that were \$100 million or more, exceeding even the previous record of seven such settlements in 2004. The average market capitalization decline associated with these nine cases was more than \$30 billion.

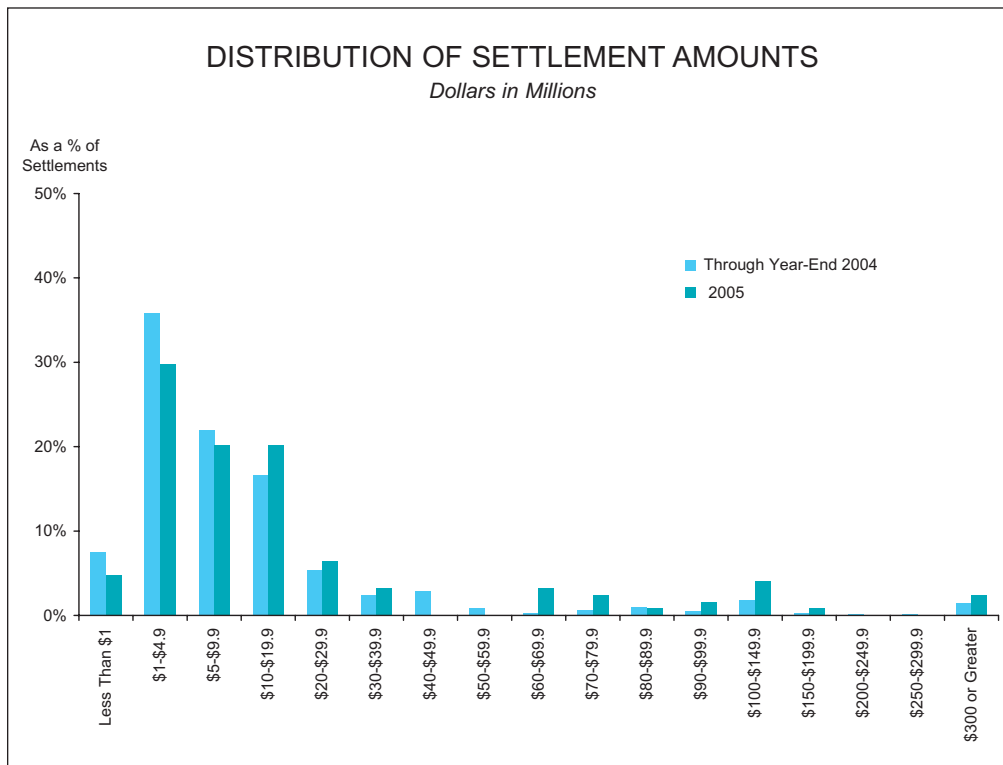


Figure 3



## 4

For purposes of our research, we apply a highly simplified approach to estimate damages, adopted with certain modifications, from a method often used by plaintiffs.<sup>6</sup> In particular, our method makes no attempt to link shareholder losses to plaintiff allegations. Accordingly, the “damage” amounts presented in this research are not intended to be indicative of actual damages borne by shareholders. However, by applying a consistent method in our computation of “estimated damages” we can examine trends in these amounts.

As shown in Figure 4, “estimated damages” remained at very high levels compared to early post-Reform Act years. However, for the first time in post-Reform Act history, average “estimated damages” decreased from the prior year average. It is too early to tell if this reversal will continue, and, while only slightly higher than 2004 and 2002, the median “estimated damages” for 2005 represents the highest amount to date.

The discrepancy between the magnitude of the median and average statistics arises from a small number of cases for which “estimated damages” are quite large. There were twelve settlements in 2005 with “estimated damages” over \$5 billion.

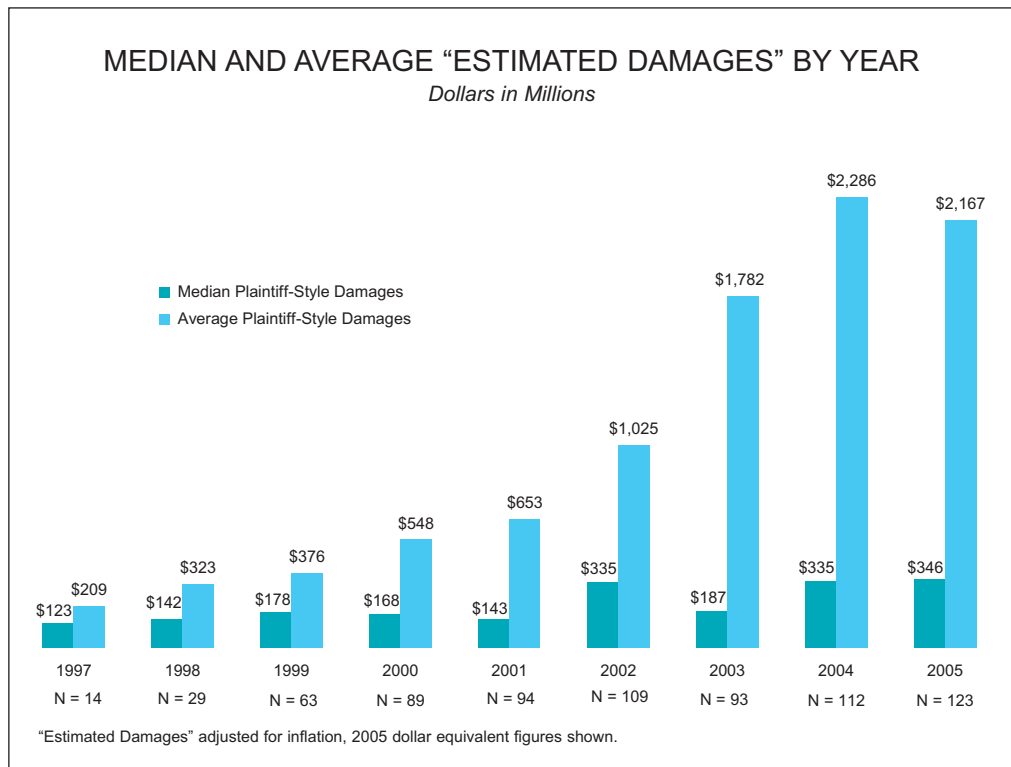
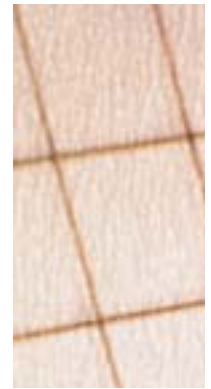


Figure 4



In 2005 settlements as a percentage of “estimated damages” were approximately 3% (lower than in all previous years). While the 2005 percentage is lower relative to previous post-Reform Act settlements, it is higher than the comparable figure of 2% for 2004.

As we have observed in our prior reports, settlements as a percentage of “estimated damages” generally decrease as damages increase. This pattern combined with the fact that overall “estimated damages” have dramatically increased in recent years, helps to explain the lower settlements as a percentage of “estimated damages” for 2005.

Approximately 30% of 2005 settled cases involved “estimated damages” of more than \$1 billion, and, as mentioned earlier, almost 10% involved amounts above \$5 billion. At the other end of the spectrum, almost 15% of cases settled during the year involved “estimated damages” of less than \$50 million.

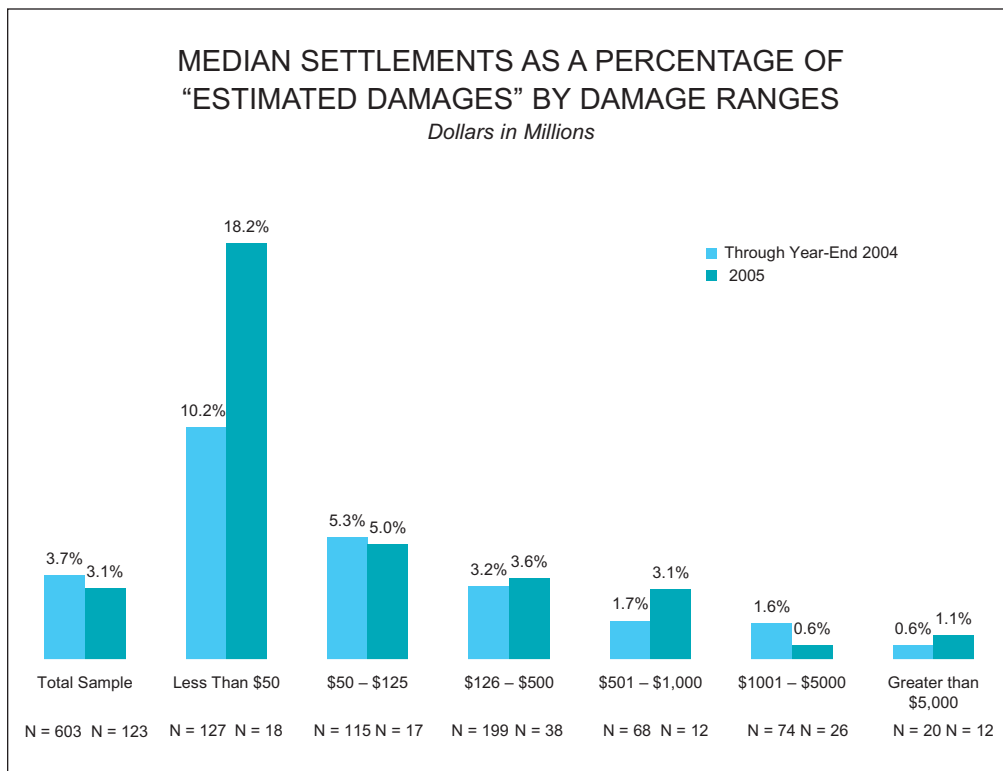


Figure 5



## 6

Figure 6 shows the median settlements as a percentage of “maximum dollar loss” (MDL) by MDL ranges. The maximum dollar loss is calculated as the dollar value decrease in the defendant firm’s market capitalization from the trading day on which its market capitalization peaked during the class period to the trading day immediately following the end of the class period. This measure is not intended to represent an estimate of damages, as it makes no attempt to isolate movements in the defendant’s stock price that are unrelated to case allegations. Nor does this measure apply a trading model to estimate the number of shares damaged.<sup>7</sup>

Similar to the trend observed with “estimated damages,” settlements as a percentage of MDL generally decline as MDL increases. As with “estimated damages,” this pattern helps to explain the slight decrease in settlements as a percentage of MDL in 2005 relative to previous years.

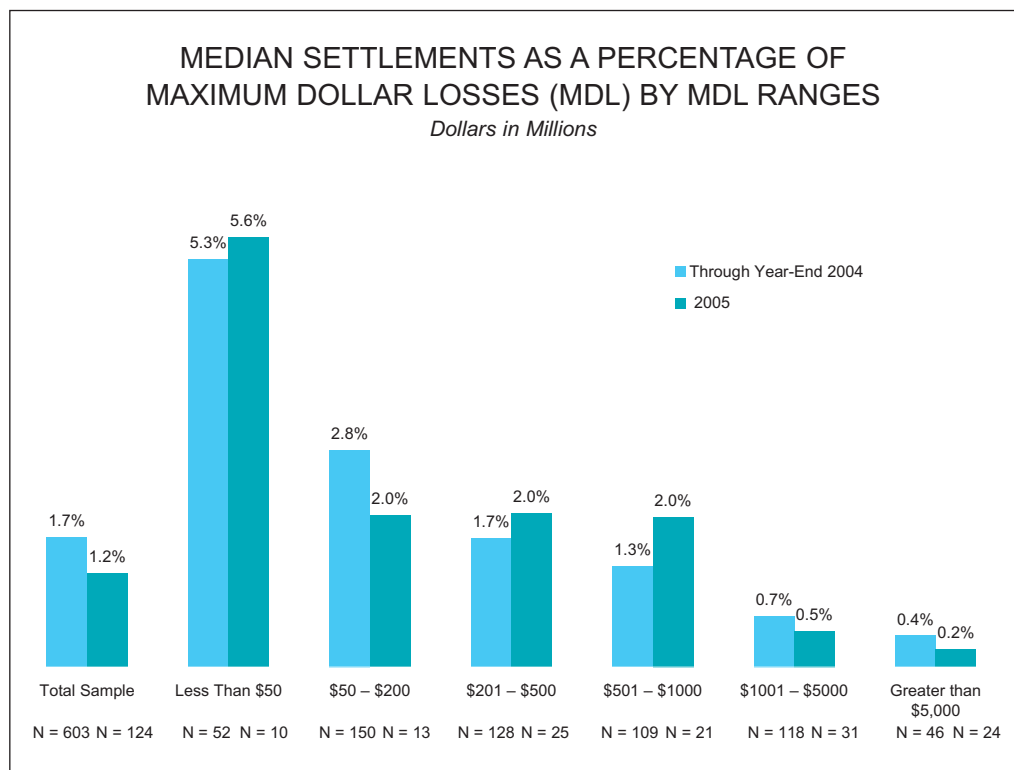


Figure 6



Accounting allegations continue to be included in approximately 55% of all cases and these cases settle for a significantly higher percentage of “estimated damages” relative to cases without accounting allegations. Furthermore, in 2005 the number of cases involving a restatement of the financial statements represented close to 40% of all settlements, almost double the percentage in 2004.

Accountants have been named in less than 20% of all post-Reform Act settlements; however, cases involving an accountant as a named defendant continue to settle for the highest percentage of “estimated damages.”

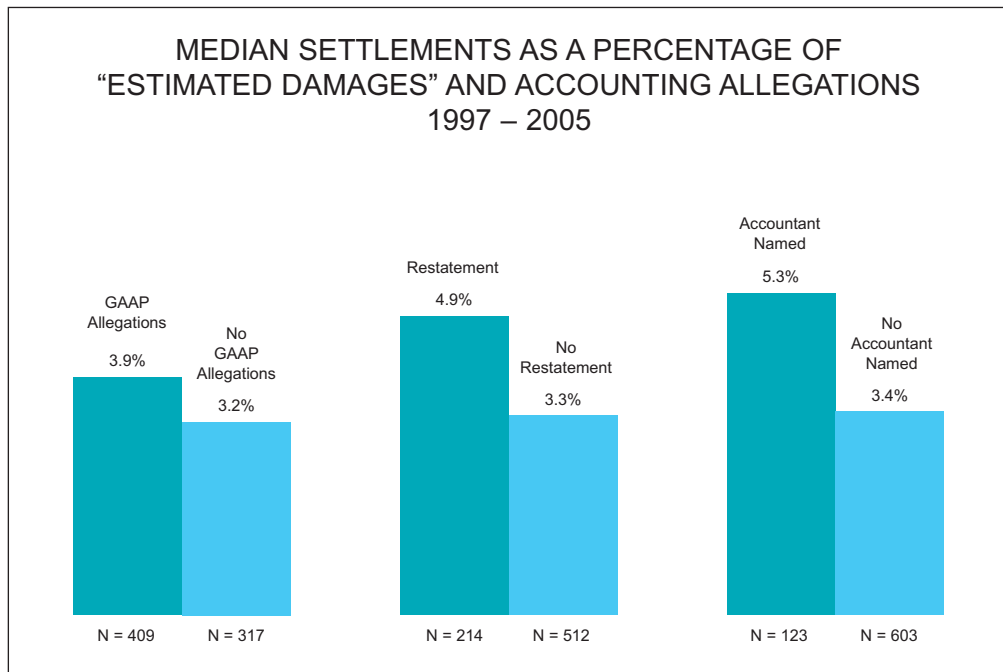


Figure 7

Consistent with previous years, almost 20% of all post-Reform Act settlements involve Section 11 and/or 12(a)(2) claims. Median settlements as a percentage of “estimated damages” are higher for these cases, compared to cases without these allegations. In cases involving an underwriter as a named defendant, settlements as a percentage of “estimated damages” are even higher.

There is substantial overlap between the inclusion of an underwriter as a named defendant and the presence of Section 11 or 12(a)(2) claims. However, underwriters are named in less than 15% of all cases.

When controlling for the presence of an underwriter defendant and other factors, Section 11 and/or 12(a)(2) claims do not have a statistically significant increase in settlement amounts.

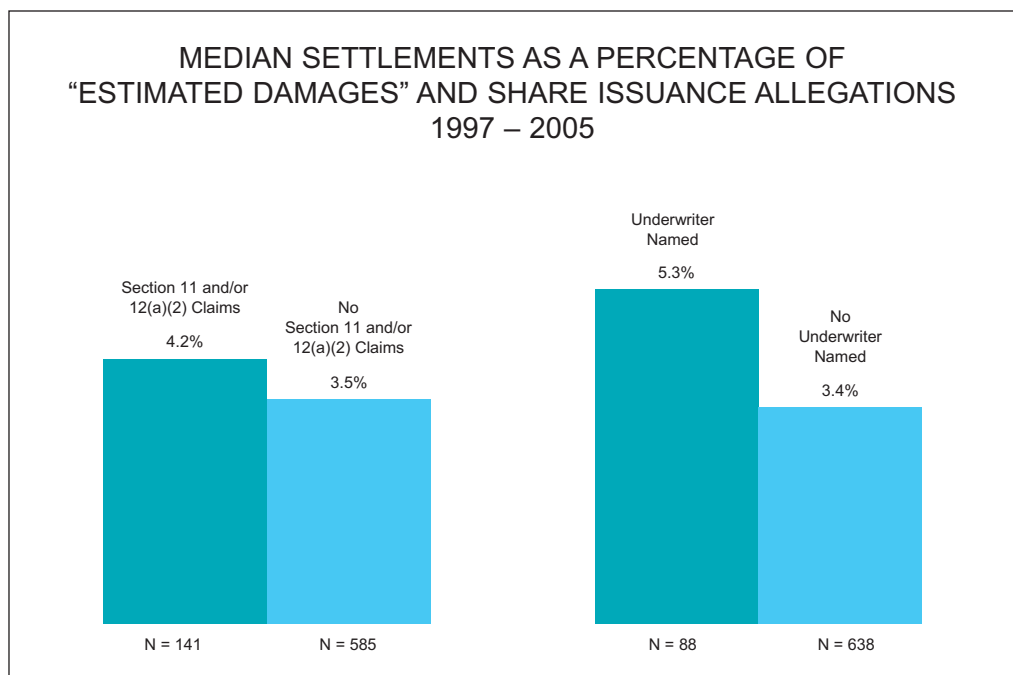


Figure 8

Consistent with Congressional intent, there has been an increase in the percentage of cases with institutional investors serving as lead plaintiffs, relative to pre-Reform Act cases. Over 35% of all 2005 settlements involving an institutional lead plaintiff.

Overall, cases involving institutions as lead plaintiffs have significantly higher settlement amounts. However, this does not necessarily indicate a causal effect on settlement outcomes due to institutions' involvement, as it is possible that institutions choose to participate in stronger cases. In addition, part of the cause for higher settlements in these cases is due to the fact that institutions tend to be involved in larger cases. Even controlling for "estimated damages" (i.e., case size), as well as other factors that affect settlement amounts (such as the nature of the allegations), the presence of an institutional investor as a lead plaintiff is associated with a statistically significant increase in settlement size.

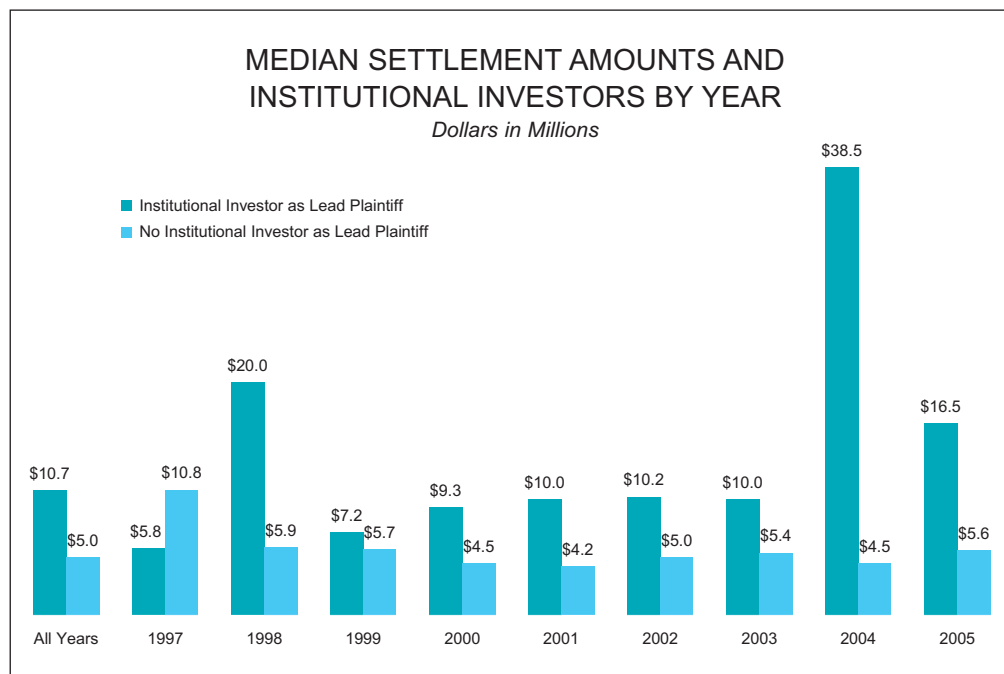


Figure 9



Institutional investors' participation in securities litigation has been associated with two other important developments in 2005. First, as previously mentioned, outside directors contributed funds from their personal assets to the class action settlements of both the Enron and WorldCom matters. At least in the WorldCom matter, this highly unusual occurrence apparently was in part the result of demands by the institutional investor lead plaintiff (the New York State Common Retirement Fund).<sup>8</sup>

Second, also in the WorldCom litigation, other institutional investor plaintiffs decided not to participate in the class action settlement, instead pursuing individual claims against WorldCom and its underwriters. These individual claimants recovered more than \$650 million during 2005, a set of recoveries that touched off a debate between plaintiffs' counsel as to which settlements had achieved a higher recovery rate for their plaintiffs.<sup>9</sup>

#### DURA PHARMACEUTICALS DECISION

On April 19, 2005, the Supreme Court reached a unanimous landmark decision in *Dura Pharmaceuticals v. Broudo*. The Court reversed an earlier decision by the Ninth Circuit Court of Appeals that plaintiffs could satisfy the loss-causation pleading requirement in 10b-5 securities cases by simply establishing that a stock price was inflated by alleged fraud at the time of purchase. Instead, the Court ruled that plaintiffs must show a causal link between the alleged misrepresentations and the subsequent actual losses suffered by plaintiffs. Thus, plaintiffs must show that any losses for which they claim damages were caused by the alleged fraud, as opposed to intervening factors.

The extent of the impact of the Supreme Court's decision will vary across court circuits due to pre-decision discrepancies in their application of the loss causation requirement. However, the decision in the *Dura* litigation clearly calls into question typical plaintiff-style damage methodologies that seek to measure recoverable damages as the simple difference between inflation at the time of purchase and inflation at the date of sale, without fully considering whether any such changes in inflation were caused by information about the alleged fraud. Moreover, under the *Dura* decision, plaintiffs who sell their securities before information about the alleged fraud reaches the market would not suffer a recoverable loss.

It is difficult to predict the extent or timing of the impact of the *Dura* decision on future settlement amounts. However, it is reasonable to expect that in many instances the damages amount that is relevant to future securities case settlement negotiations will be lower as a result of the above factors.

The number of cases involving companion derivative actions has been increasing in recent years. Almost 35% of cases settled in 2005 were accompanied by the filing of a derivative action. For purposes of our study, a derivative action, generally a case filed against the officers and directors on behalf of the issuer corporation, must have allegations similar to the class action in nature and time period in order to be considered an accompanying action.<sup>10</sup>

Derivative cases are often resolved with changes to the issuer's corporate governance practices and little or no cash payment. While the settlement of a derivative action does not necessarily result in a cash payment, settlement amounts for class actions accompanied by derivative cases are significantly higher than for cases not involving derivative actions. However, settlements as a percentage of "estimated damages" are slightly lower than for cases without accompanying derivative actions.

Derivative actions tend to be associated with larger class action cases (as measured by "estimated damages" and the assets of the issuer defendant), as well as class actions involving accounting allegations, SEC actions, and institutional investor lead plaintiffs. It is likely that these circumstances attract the accompanying derivative actions, leading to the higher settlements observed in the class actions. Consistent with this, for the class actions in our sample, derivative actions have been less likely to be filed in cases in which the defendant has filed for bankruptcy or had its stock delisted.

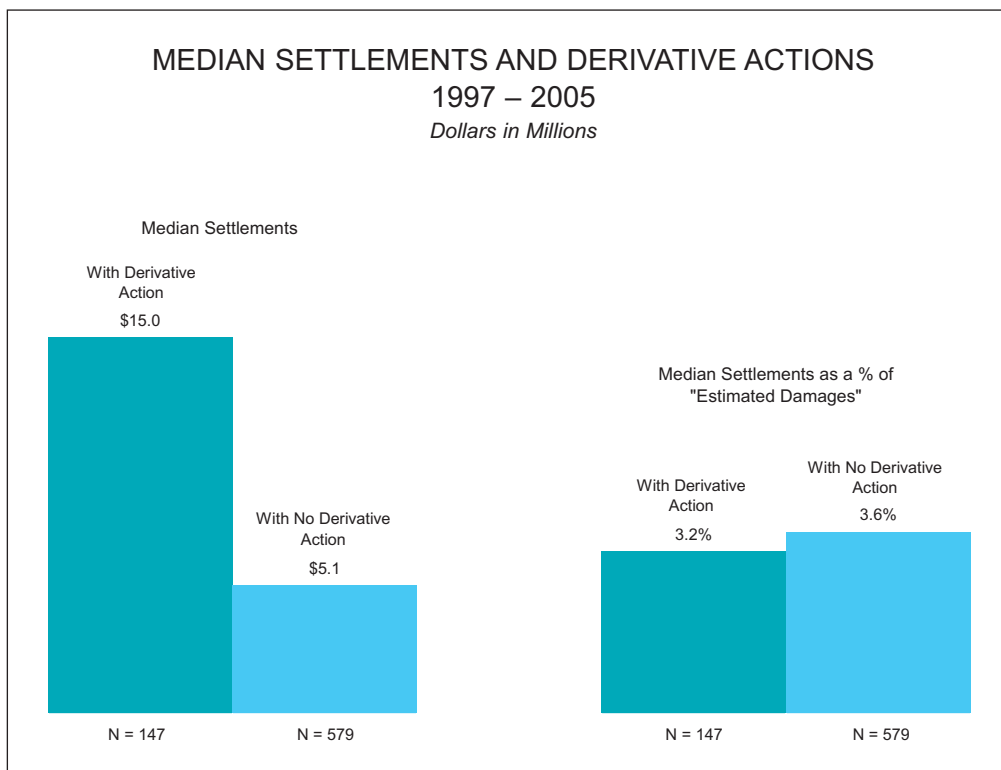


Figure 10

Figure 11 reports settlements classified by whether the case was accompanied by a corresponding filing of a litigation release or administrative proceeding by the SEC. Over 20% of all post-Reform Act settlements have involved such SEC actions. These cases are associated with both higher settlement amounts and higher settlements as a percentage of “estimated damages.”

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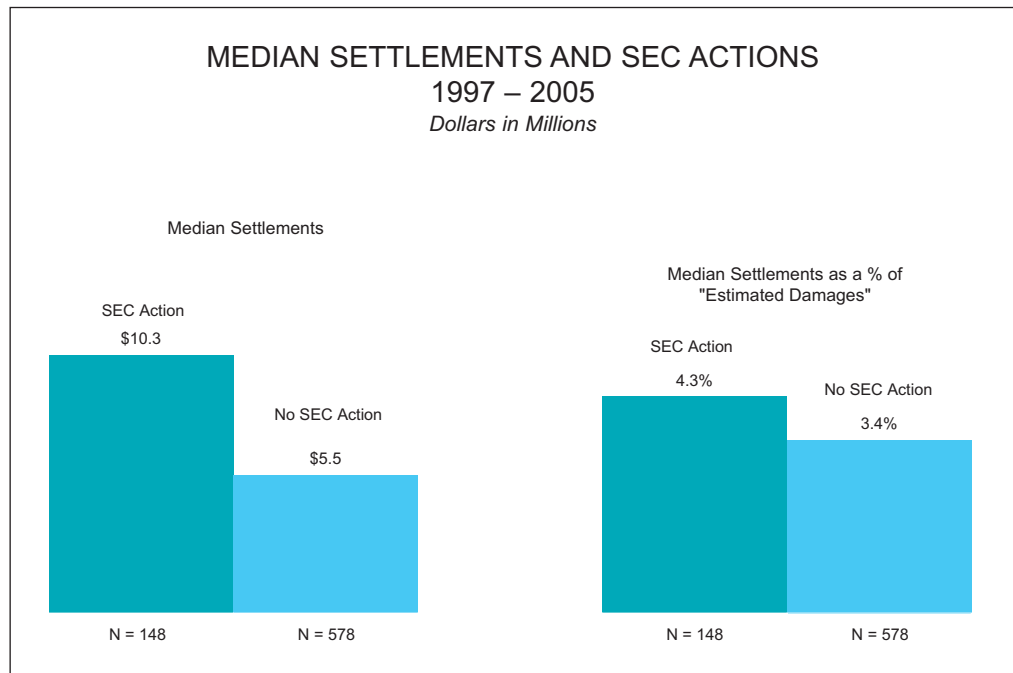
**12**

Figure 11

With increasing frequency in recent years, class action settlements have been accompanied by settlements of related matters with the SEC. Figure 12 shows cases from our sample for which monetary settlements have been finalized with the SEC though not necessarily concurrently with the related class actions. The majority of such settlements occurred in 2004 and 2005.<sup>11</sup>

CASES WITH ACCOMPANYING SEC SETTLEMENTS		
<i>Dollars in Millions</i>		
<u>Case</u>	<u>Settlement Fund in SEC Action</u>	<u>Settlement Fund in Related Class Action</u>
WorldCom, Inc.	\$750.0	\$6,156.1
Computer Associates International, Inc.	\$225.0	\$128.6
Bristol-Myers Squibb Company	\$150.0	\$300.0
Symbol Technologies	\$37.0	\$102.0
Lucent Technologies, Inc.	\$25.0	\$517.2
i2 Technologies, Inc.	\$10.0	\$87.8
Gemstar-TV Guide International, Inc.	\$10.0	\$92.5
Homestore Inc.	\$5.0	\$78.0
Measurement Specialties, Inc.	\$1.5	\$8.1

Figure 12





14

Approximately 30% of the issuer firms in our sample filed for bankruptcy or had their stock delisted from a major exchange before the class action settlement hearing date. Settlement amounts for these cases are significantly lower than for cases in which the defendant firms do not exhibit these signs of distress.

Cases involving distressed firms are substantially smaller in terms of “estimated damages,” which helps to explain why settlements as a percentage of “estimated damages” for these cases are slightly higher than for non-distressed firms. When other factors that affect settlement amounts are considered in addition to “estimated damages,” the fact that the defendant firm is distressed is associated with a statistically significant decrease in settlement size.

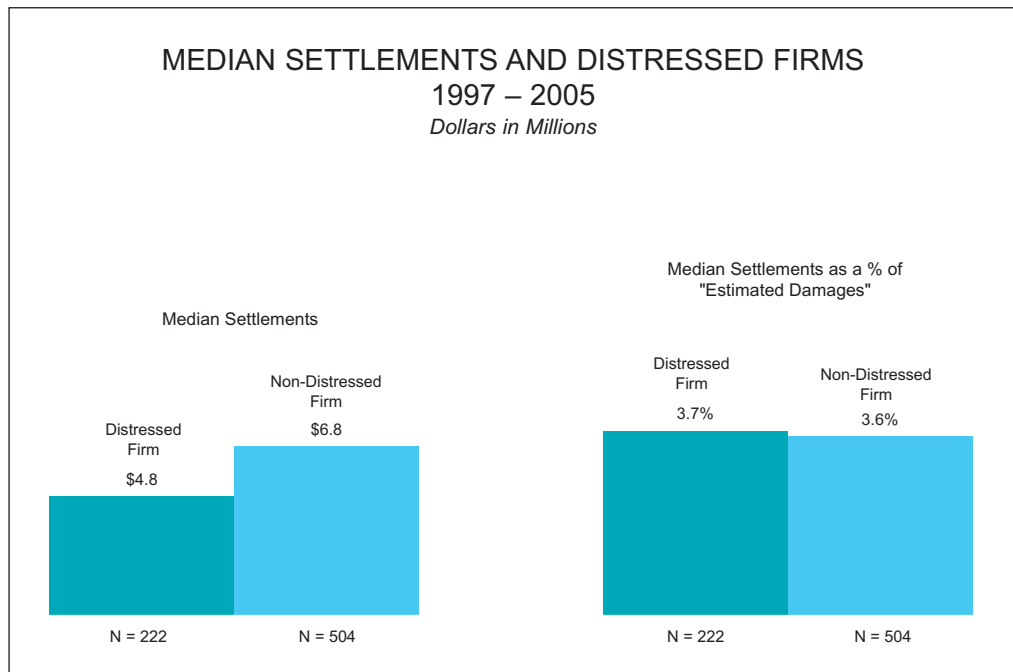


Figure 13



The percentage of settlements involving non-cash components (e.g., stock or warrants) continued to decline in 2005 to 7%. In 2005, non-cash components represented 40% of the total settlement value for the few cases that included these components, down slightly from 43% in 2004. In nine cases in our sample of all post-Reform Act settlements, non-cash components comprise in excess of 90% of the settlement fund.

The inclusion of non-cash components in the settlement fund is associated with a statistically significant increase in total settlement value, even when controlling for other factors such as “estimated damages” and the nature of the allegations.

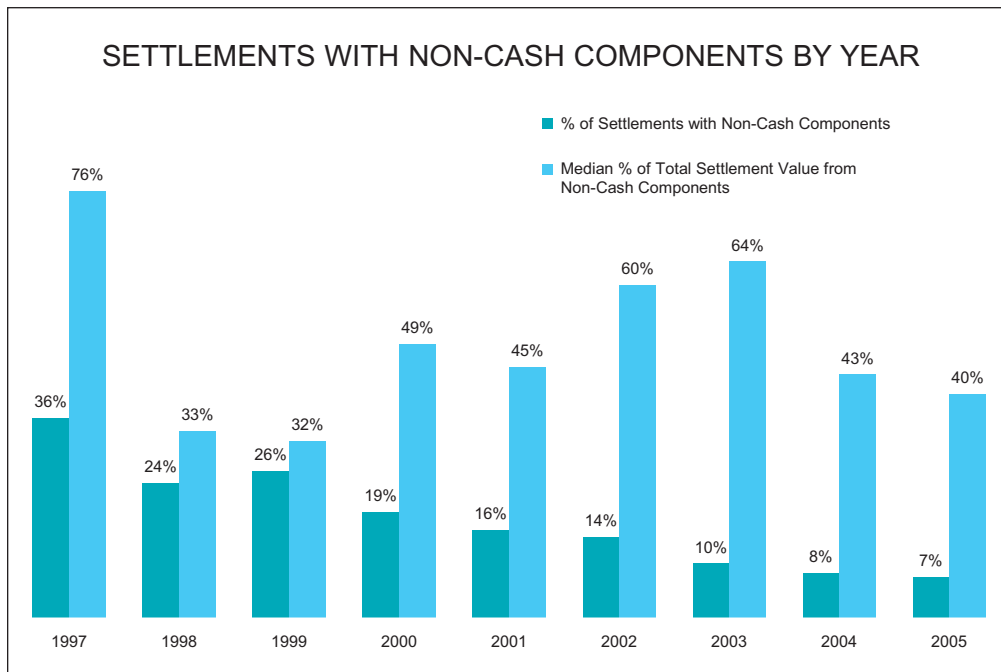


Figure 14

In previous years the law firm of Milberg Weiss Bershad Hynes & Lerach LLP was involved as lead or co-lead plaintiff counsel in roughly 50% of all post-Reform Act settlements.<sup>12</sup> Effective May 1, 2004, the firm separated to become Milberg Weiss Bershad & Schulman LLP (Milberg Weiss) and Lerach Coughlin Stoia Geller Rudman & Robbins LLP (Lerach Coughlin).

The individual firms of Milberg Weiss and Lerach Coughlin continued to dominate as lead plaintiff counsel in terms of the proportion of settlements in which they were involved in 2005.

Plaintiff Law Firm	2005		Through Year-End 2004	
	% of Settlements	Median Settlement as a % of "Estimated Damages"	% of Settlements	Median Settlement as a % of "Estimated Damages"
1 Lerach Coughlin Stoia Geller Rudman & Robbins	32%	4.0%	-	-
2 Milberg Weiss Bershad & Schulman	25%	1.5%	-	-
<i>Combined figure for:</i>	-	-	52%	3.6%
– Milberg Weiss Bershad & Schulman				
– Lerach Coughlin Stoia Geller Rudman & Robbins				
3 Schiffrin & Barroway	11%	2.6%	8%	1.8%
4 Cauley Bowman Carney & Williams	7%	5.1%	4%	3.5%
5 Berger & Montague	7%	4.5%	9%	3.3%
6 Bernstein Liebhard & Lifshitz	6%	2.1%	4%	4.0%
7 Wolf Haldenstein Adler Freeman & Herz	6%	0.4%	3%	2.0%
8 Labaton Sucharow & Rudoff	4%	5.0%	2%	9.6%
9 Kaplan Fox & Kilsheimer	4%	2.9%	4%	3.9%
10 Bernstein Litowitz Berger & Grossman	3%	3.4%	7%	3.5%

Figure 15



As shown in Figure 16, settlements continue to occur most frequently in the Ninth Circuit, followed by the Second Circuit.

There is substantial variation between circuits in the number and size of settlements. Case jurisdiction, however, is often correlated with other factors such as industry sector (e.g., the concentration of technology firms in the Ninth Circuit). When controlling for the effects of “estimated damages” and other important determinants of settlement amounts, court circuits are not significant in explaining settlement size.

Court Circuit	No. of Cases		Median Settlement	
	2005	Through Year-End 2004	2005	Through Year-End 2004
1	5	40	\$3.0	\$5.8
2	24	88	\$8.0	\$5.7
3	8	59	\$5.2	\$6.4
4	2	21	\$7.3	\$5.3
5	17	44	\$5.3	\$6.0
6	10	29	\$10.4	\$10.2
7	4	34	\$15.9	\$6.3
8	8	17	\$16.0	\$6.3
9	27	156	\$10.4	\$6.1
10	5	26	\$13.9	\$6.5
11	14	64	\$5.3	\$4.1
DC	-	1	-	\$32.5
State	-	32	-	\$4.0
<b>Total</b>	<b>124</b>	<b>611</b>		

Figure 16



## CORNERSTONE RESEARCH SETTLEMENT PREDICTION MODEL

Characteristics of securities cases that may affect settlement outcomes are often correlated with each other. The use of regression analysis allows us to examine the effects of these factors simultaneously. Our analysis performed on a sample of 735 post-Reform Act cases settled through December 2005 reveals that the following variables are important determinants of settlement amounts:<sup>13, 14</sup>

- Simplified plaintiff-style “estimated damages”
- Most recently reported total assets of the defendant firm
- The number of entries on the lead case docket
- Whether a restatement of the financial statements, announced during or at the end of the class period, is involved
- Whether a corresponding SEC action against the issuer or other defendants is involved
- Whether an accountant is a named co-defendant
- Whether an underwriter is a named co-defendant
- Whether a corresponding derivative action is filed
- Whether the settlement occurred in 2002 or later
- Whether an institution is involved as lead or co-lead plaintiff
- Whether the firm filed for bankruptcy or was delisted prior to settlement
- Whether the lead or co-lead plaintiff law firm is Milberg Weiss or Lerach Coughlin (or the predecessor firm)
- Whether non-cash components, such as stock or warrants, comprise a portion of the settlement fund
- Whether there are securities other than common stock alleged to be damaged

Settlements are higher when “estimated damages,” defendant asset size, or the number of docket entries are higher. Settlements are also higher with the presence of any of the following variables: a restatement, a corresponding SEC action, an accountant named as co-defendant, an underwriter named as co-defendant, a corresponding derivative action, an institution involved as lead plaintiff, Milberg Weiss or Lerach Coughlin involved as lead or co-lead plaintiff law firm, a non-cash component to the settlement, or securities other than common stock are alleged to be damaged. Settlements are lower if the settlement occurred in 2002 or later, or if the issuer firm filed for bankruptcy or was delisted prior to the settlement.

Almost 65% of the variation in settlement amounts can be explained by these variables.

Our clients are often interested in obtaining estimates of expected settlement amounts in securities cases. Cornerstone Research has developed a prediction model that can be used to estimate expected settlement amounts for post-Reform Act cases. Settlement estimates based on this model are available to our clients.

## CONCLUDING REMARKS

As noted in our introduction, 2005 was a noteworthy year for securities case settlements. This was true both in terms of the significant increase in the size and the number of settlements, as well as several events that occurred during the year.

Settlements increased even in relation to “estimated damages,” reversing a declining trend from previous years. Contributing to this increase were a larger number of cases involving restatements of the financial statements and a larger number of institutions serving as lead plaintiffs, both of which are associated with higher settlement amounts.

With the extremely rare instances of personal contributions to settlements by outside directors, the significant settlements obtained by plaintiffs choosing to opt-out of the WorldCom class action, and the *Dura Pharmaceuticals* Supreme Court decision, 2005 provides an interesting landscape for securities class action settlements in upcoming years.

## SAMPLE AND DATA SOURCES

The sample of cases discussed in this monograph was identified from Institutional Shareholder Services’ Securities Class Action Services (SCAS). Our database is limited to cases alleging fraudulent inflation in the price of a corporation’s common stock (i.e., excluding cases filed only by bondholders, preferred stockholders, etc. and excluding cases alleging fraudulent stock price depression). Our sample is also 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 were imposed to ensure data availability and to provide a relatively homogeneous set of cases with respect to the nature of the allegations.

In addition to the SCAS, data sources include Factiva, Bloomberg, the Center for Research in Security Prices at the University of Chicago, Standard & Poor’s Compustat, court filings and dockets, SEC registrant filings, SEC litigation releases and administrative proceedings, LEXIS-NEXIS, and the public press.

## FOOTNOTES

- 1 The Enron settlement figure includes approximately \$6.6 billion for which the hearing date to approve the settlements had not yet occurred. This amount is excluded from the statistics presented in this monograph to maintain consistency with the treatment of other cases in the sample.
- 2 Comparison to prior years also excludes the Cendant Corporation settlement in 2000.
- 3 In 1996 there is only one post-Reform Act settlement that meets our sample criteria. Given the limited data available for this year, 1996 is excluded from presentation in this report. In addition, for all figures involving “estimated damages” eight settlements are excluded due to a lack of available stock price data, and the WorldCom settlement is excluded since the majority of the amounts settled in the case relate to liability associated with bond offerings (and our research does not compute damages related to securities other than common stock).
- 4 The small number of settlements in the early years following passage of the Reform Act reflects the fact that overall, securities cases typically settle almost three years after they are filed (and our sample is limited to cases filed after December 22, 1995).
- 5 Movements of partial settlements between years can cause differences in amounts reported for prior years from those presented in earlier publications. For a settlement to be moved from inclusion in an earlier year to a more recent year, the subsequent partial settlement must be at least 50% of the original settlement.
- 6 Our simplified plaintiff-style model is applied to common stock only. For all cases involving Rule 10b-5 claims, damages are determined from a market-adjusted backward value line. For cases involving only Section 11 and/or 12(a)(2) claims, damages are determined from a model that caps per-share damages at the offering price. A volume reduction of 50% for shares traded on Nasdaq and 20% for shares listed on NYSE or AMEX is used. Finally, no adjustments for institutions, insiders, or short sellers are made to the float.
- 7 We present MDL information in Figure 6 to provide a benchmark for the convenience of our readers since the measure is simple to compute and does not require application of a trading model.
- 8 Carton, Bruce T. “Commentary: WorldCom 360°.” Securities Class Action Services. <http://www.issproxy.com/scas> (April 2005)
- 9 *Class Action And “Opt Out” Lawyers Duke It Out*, Compliance Week, November 8, 2005.
- 10 Accompanying derivative actions are identified primarily through a search of the public press and review of court dockets and SEC filings.
- 11 Table does not include preliminary settlements with the SEC (i.e., settlements that have been announced but not yet approved).
- 12 Determination of involvement as lead or co-lead counsel is based upon reporting by the SCAS.
- 13 The model does not capture the effect of non-public or non-measurable factors that influence settlement outcomes. These factors include the relative merits of the case, as well as limits of available insurance.
- 14 Due to the presence of extreme observations in the data, logarithmic transformations are applied to settlement amounts, “estimated damages,” the defendant’s total assets, and the number of docket entries.

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Laura Simmons is a principal in the Washington, DC office and has over fourteen years of experience in accounting practice and economics consulting. She is a certified public accountant and specializes in accounting issues arising in complex commercial litigation, including securities, breach of contract, and intellectual property matters. Her experience in securities litigation has involved analysis of damage and liability issues for both equity and fixed income securities. She has served as a testifying expert in cases involving accounting analyses and research on securities lawsuits.

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. She has spoken at various conferences addressing the topic of securities case settlements. From 1986 to 1991, she was an accountant with Price Waterhouse.

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