UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

FADI DAHHAN, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. OVASCIENCE, INC., et al., Defendants.	No. 1:17-cv-10511-IT CLASS ACTION DECLARATION OF STEPHEN R. ASTLEY IN SUPPORT OF: (A) LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION, AND (B) LEAD COUNSEL'S MOTION FOR ATTORNEYS' FEES AND LITIGATION EXPENSES, CHARGES AND COSTS

I, STEPHEN R. ASTLEY, declare under penalty of perjury, pursuant to 28 U.S.C. §1746:

1. I am a partner of the law firm Robbins Geller Rudman & Dowd LLP ("Robbins Geller"). Robbins Geller serves as Lead Counsel on behalf of the Court-appointed Lead Plaintiff, Freedman Family Investments LLC ("Lead Plaintiff"), in this securities class action (the "Litigation"). I submit this declaration in support of: (i) final approval of the Settlement Lead Plaintiff reached on behalf of itself and the Class with Defendants OvaScience, Inc. ("OvaScience" or the "Company"), Michelle Dipp ("Dipp"), Jeffrey E. Young ("Young") (together, OvaScience, Dipp, and Young are the "OvaScience Defendants"), Longwood Fund, L.P., Longwood Fund, GP, LLC ("Longwood Funds"), and Richard Aldrich ("Aldrich") (collectively, the OvaScience Defendants, Longwood Funds, and Aldrich are "Defendants," and, together with Lead Plaintiff, the "Parties"); (ii) approval of the proposed plan for the allocation of the Net Settlement Fund ("Plan of Allocation"); and (iii) approval of Lead Counsel's application for an award of attorneys' fees and litigation expenses, costs and changes ("Fee and Expense Application").[1] Unless otherwise indicated, I have personal knowledge of the matters set forth herein based both on my extensive participation in the prosecution and settlement of the claims asserted in the Litigation and my supervision of those working at my direction.

2. The Settlement will resolve all claims asserted in the Litigation against all Defendants on behalf of the Class, which consists of all persons or entities who purchased or otherwise acquired OvaScience publicly-traded common stock between December 17, 2014 and September 28, 2015, inclusive (the "Class Period").[2]

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[1] Capitalized terms not otherwise defined herein have the meanings given to them in the Stipulation and Agreement of Settlement dated March 4, 2022 ("Stipulation") (ECF 174).

[2] Excluded from the Class are: Defendants; the officers and directors of OvaScience, at all relevant times; members of their immediate families and their legal representatives, heirs, successors or assigns; and any entity in which Defendants have or had a controlling interest. Also excluded

I. PRELIMINARY STATEMENT: THE SIGNIFICANT RECOVERY ACHIEVED

3. The proposed Settlement was negotiated at arm's length and reached only after two separate and independent mediations, ultimately being facilitated by the diligent effort of the Parties with the aid of the mediator, the Honorable Daniel Weinstein (Ret.). Through the Parties' effort and only after extensive arm's-length settlement negotiations, Lead Counsel obtained a $15 million cash recovery for the Class, which has been deposited in an interest-bearing escrow account. As set forth in the Stipulation, in exchange for this payment, the proposed Settlement resolves all claims asserted in the Litigation by Lead Plaintiff and the Class against Defendants.

4. Before agreeing to the Settlement, Lead Counsel conducted extensive discovery of the events underlying the claims alleged in the Litigation, including review of almost 500,000 documents produced during discovery and multiple fact depositions. Additionally, Lead Counsel analyzed the evidence adduced from, *inter alia*: (i) review and analysis of filings OvaScience made with the U.S. Securities and Exchange Commission ("SEC"); (ii) review and analysis of transcripts of press conferences, analyst conference calls, and industry conferences; (iii) review and analysis of OvaScience's corporate website; (iv) review and analysis of securities analyst reports concerning the Company and its operations; (v) review and analysis of certain other documents and materials concerning the Defendants, including pleadings and orders in other actions, news articles, and trade periodicals; (vi) documents that pertained to a parallel SEC investigation, including numerous deposition transcripts of Defendant Dipp and other key executives; and (vii) consultations with experts regarding market efficiency, loss causation and damages-related issues.

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from the Class is any Class Member that validly and timely requests exclusion in accordance with the requirements set by the Court. Order Preliminarily Approving Settlement and Providing for Notice dated April 1, 2022 ("Preliminary Approval Order") (ECF 178), ¶2.

5. According to analyses prepared by Lead Plaintiff's damages expert, the maximum estimated aggregate damages the Class could have obtained at trial are approximately $327 million. That estimate assumes that Lead Plaintiff prevailed on all disputed issues, included on appeal, and that all Class Members participated in the recovery. As detailed more fully herein, Defendants strenuously maintained, and continue to maintain, that no liability or damages could be proven at trial. Nevertheless, the Settlement represents a gross recovery of nearly 4.5% of maximum estimated damages, which is within the range of reasonableness and warrants final approval of the Settlement. *See, e.g.*, *Medoff v. CVS Caremark Corp.*, 2016 U.S. Dist. LEXIS 19135, at *18 (D.R.I. Feb. 17, 2016) (approving a 5.33% recovery).

6. Moreover, the Settlement is in line with the median settlement values for securities fraud cases settled in 2021 ($8 million). *See* Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review* at 20 (NERA Jan. 25, 2022) (attached hereto as Ex. A). On a percentage basis, the Settlement is in line the 5% median percentage of estimated damages recovered in PSLRA cases asserting claims under Rule 10b-5. *See* Laarni T. Bulan & Laura E. Simmons, *Securities Class Action Settlements: 2021 Review and Analysis* at 6 (Cornerstone Research 2022) (attached hereto as Ex. B).

7. As discussed below, Lead Plaintiff and its counsel obtained this substantial recovery for the Class despite the significant risks it faced in prosecuting the Litigation. The settlement amount paid by Defendants, when viewed in the context of these risks and uncertainties, makes the Settlement a very favorable result for the Class.

8. The Settlement has the full support of the Lead Plaintiff, as detailed in the Declaration of Edward Freedman, submitted herewith. The Order preliminarily approving the Settlement was signed on April 1, 2022. *See* ECF 178.

II. RELEVANT PROCEDURAL HISTORY

9. The Litigation was commenced on March 24, 2017, by the filing of a complaint captioned *Fadi Dahhan v. OvaScience, Inc.*, *et al.*, No. 17-10511, in the United States District Court for the District of Massachusetts, against OvaScience, Defendant Dipp, and Defendant Young, alleging violations of the federal securities laws. *See* ECF 1.

A. Appointment of Lead Plaintiff

10. On May 26, 2017, Freedman Family Investments LLC filed a motion for appointment as lead plaintiff and for approval of its selection of lead counsel. *See* ECF 11-13.

11. On July 16, 2018, pursuant to the provisions of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), the Court appointed Freedman Family Investments LLC as Lead Plaintiff, and appointed Robbins Geller to serve as Lead Counsel. *See* ECF 42.

B. Defense Counsel in the Litigation

12. In connection with the claims asserted by Lead Plaintiff on behalf of the Class, OvaScience retained the highly experienced law firm, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C ("Mintz Levin"), to represent it, Defendant Dipp, Defendant Young, and (later) Defendant Aldrich. The Longwood Funds were represented by Prince Lobel Tye LLP.

C. Lead Plaintiff's Investigation Regarding OvaScience's Securities Fraud Violations

13. In accordance with the PSLRA, formal discovery in the case was stayed until the Court ruled on the OvaScience Defendants' motion to dismiss. Nevertheless, prior to and following Lead Plaintiff's appointment, Lead Counsel directed an extensive investigation, as detailed above, of the alleged securities law violations.

D. The Amended Complaint and the OvaScience Defendants' Motion to Dismiss

14. Lead Counsel prepared and filed the Amended Class Action Complaint ("Amended Complaint") on behalf of Lead Plaintiff and other OvaScience investors on August 25, 2017. *See* ECF 27. The Amended Complaint alleges, among other things, that OvaScience and Defendant Dipp violated §10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5, by knowingly or recklessly misrepresenting and concealing material facts regarding the efficacy and commercial viability of AUGMENT, a new fertility treatment, and that Defendants Dipp and Young violated §20(a) of the Exchange Act. More specifically, the Amended Complaint alleges that throughout the Class Period, the OvaScience Defendants made numerous misstatements and omissions that led investors to believe that AUGMENT worked, there was significant demand from patients for the treatment, and the Company would achieve 1,000 commercial cycles of AUGMENT, which caused OvaScience's common stock to allegedly trade at artificially inflated prices during the Class Period. The Amended Complaint further alleges that the price of OvaScience stock declined when the true facts concerning the OvaScience Defendants' alleged misrepresentations and omissions were revealed, resulting in financial losses to those who purchased OvaScience stock at the inflated prices.

15. On October 10, 2017, the OvaScience Defendants filed their motion to dismiss the Amended Complaint. *See* ECF 30-32. The OvaScience Defendants' motion to dismiss raised numerous legal challenges. In sum, the OvaScience Defendants argued that: (i) the Amended Complaint did not comply with the heightened pleading standards of the PSLRA or Federal Rule of Civil Procedure 9(b); (ii) Lead Plaintiff failed to allege particularized facts demonstrating a material misstatement or omission by the OvaScience Defendants with respect to matters as to which they had a duty to disclose; (iii) Lead Plaintiff failed to allege particularized facts that gave rise to a

strong inference that the OvaScience Defendants acted with scienter; (iv) the forward-looking statements Lead Plaintiff alleged to be materially false and misleading, as well as alleged statements of opinion and/or puffery, were not actionable because they were accompanied by adequate cautionary language; and (v) Lead Plaintiff failed to state a control person claim under §20(a) of the Exchange Act. *See* ECF 31.

16. In its opposition brief, Lead Plaintiff pointed to the myriad allegations pled in the Amended Complaint supporting each of the challenged elements. *See* ECF 34. For example, the Amended Complaint details statements from the OvaScience Defendants, in which they failed to tell investors about the true nature of AUGMENT's efficacy and commercial viability. In addition, the opposition to the motion to dismiss argued that the Amended Complaint highlights numerous indicia that, when considered collectively, give rise to a strong inference of scienter, including: (i) the OvaScience Defendants' intimate knowledge of and participation in the fraudulent scheme alleged herein; (ii) the OvaScience Defendants' own admissions; (iii) the OvaScience Defendants' alteration of their reporting practices; and (iv) the OvaScience Defendants' efforts to deny, downplay, and cover up their fraudulent conduct. The Court entered its order denying the OvaScience Defendants' motion to dismiss on July 31, 2018, ECF 44. The OvaScience Defendants filed their answer on August 14, 2018, denying all allegations. ECF 45.

E. The Second Amended Complaint, the OvaScience Defendants' Motion to Strike, and the Longwood Funds' Motion to Dismiss

17. Based upon information learned during discovery, Lead Plaintiff filed its Second Amended Class Action Complaint on April 7, 2020 (under seal) (the "Second Amended Complaint"), which added as defendants the Longwood Funds and Aldrich for alleged violation of §20(a) of the Exchange Act, 15 U.S.C. §78t(a), as controlling persons of OvaScience and/or Defendant Dipp. Thereafter, on May 1, 2020, the OvaScience Defendants moved to strike the

Second Amended Complaint on grounds that the applicable statute of limitations had expired and, as such, the claims were barred. ECF 93. The Longwood Funds filed a motion to dismiss the Second Amended Complaint on May 1, 2020, also asserting that the applicable statute of limitations had expired. ECF 96. Defendant Aldrich joined in both motions. ECF 108.

18. Lead Plaintiff filed its opposition to the motions to strike and to dismiss (under seal) on May 22, 2020. On May 28, 2021, the Court denied the motions to strike and to dismiss in their entirety. ECF 130. The Second Amended Complaint was filed publicly on June 29, 2021, and remains the operative pleading. *See* ECF 140. Answers to the Second Amended Complaint were filed on July 13, 2021. ECF 146-47.

III. FACT DISCOVERY

19. Following the lifting of the PSLRA automatic discovery stay, the Parties exchanged initial disclosures pursuant to Federal Rule of Civil Procedure 26(a). Lead Plaintiff also promptly propounded detailed discovery requests and third party subpoenas, and ultimately reviewed and analyzed about 500,000 documents produced by Defendants and third-parties. Lead Plaintiff, through counsel, took numerous depositions of relevant persons, including OvaScience, and defended the deposition of its economic expert. The OvaScience Defendants served discovery requests on Lead Plaintiff in connection with class certification.

20. The parties' objections, responses, and answers to one another's discovery requests prompted numerous meet and confer sessions as to the scope and manner of each party's responses, objections, and document production. Through these efforts and over the course of many months of extensive meet and confer sessions and protracted letter-writing on various discovery matters, the parties successfully came to agreement on many issues, including search terms and custodians. The parties' extensive negotiations around the scope of document discovery resulted in numerous compromises that alleviated the need to raise disputes with the Court.

21. To facilitate the cost and time-efficient nature of the document review process, all of the documents were placed in an electronic database, known as Relativity, which was created and maintained at Robbins Geller. The database allowed Lead Counsel to search for and code documents through Boolean-type searches as well as by multiple categories, such as by author and/or recipient, type of document, date, Bates number, etc. The database also enabled the streamlined ability to cull and organize witness-specific documents in folders for review.

22. To review the document production, a team of attorneys from Robbins Geller and Criden & Love, P.A. was assembled. Those attorneys worked nearly full-time to complete the document review and analysis as quickly and efficiently as possible. The attorneys utilized review guidelines and protocols that were put in place and monitored to ensure efficient and accurate review of the documents. The review was structured to limit overall cost, with the bulk of the initial review being conducted by more junior attorneys.

23. All aspects of the attorney document review were carefully supervised to eliminate inefficiencies and to ensure a high quality work-product. This supervision included in-person training sessions, the creation of a set of relevant materials and information, presentations regarding the key legal and factual issues in the case, and in-person instruction from more senior attorneys. The team of attorneys assigned to review discovery was overseen by a staff attorney, who had responsibility for constant, daily supervision, and quality assurance. In addition, the more senior attorneys on the litigation team had oversight of the staff attorney and review team. Senior litigation attorneys also held frequent conferences to discuss important and/or "hot" documents, discovery preparation efforts, and case strategy. The "hot" and highly relevant documents were all subject to further analysis and assessment by senior attorneys on an on-going basis.

24. As reflected in the lodestar schedules submitted herewith, the team of attorneys that litigated this case was concentrated and dedicated to this Litigation. *See* Ex. A to all Fee Declarations.

25. Throughout the discovery process, Lead Counsel analyzed not only what was produced, but also tracked discovery that potentially was still outstanding. Lead Counsel held numerous meet and confer sessions with Defendants' counsel and exchanged correspondence with them to ensure the production of all agreed-upon materials.

IV. CLASS CERTIFICATION

26. On March 14, 2019, Lead Plaintiff filed its application for class certification pursuant to Rule of Civil Procedure 23. ECF 59-61. Lead Plaintiff sought certification for a class consisting of all persons and entities who purchased or otherwise acquired the publicly traded common stock of OvaScience between December 17, 2014 and September 28, 2015, inclusive, and who were damaged thereby. Lead Plaintiff further sought its appointment as the class representative and Robbins Geller as class counsel. The OvaScience Defendants filed their opposition to class certification on April 29, 2019 (ECF 63), to which Lead Plaintiff replied on June 13, 2019 (ECF 65). On May 8, 2020, the Court entered its order finding that the proposed class meets the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3) and appointed Lead Plaintiff as class representative but sought additional information before appointing class counsel under Rule 23(a)(4). ECF 99. Lead Counsel submitted the requested additional information on May 15, 2020 (ECF 100), and the Court certified the Class and appointed class counsel on May 18, 2020. ECF 101.

27. On June 5, 2020, Lead Plaintiff filed its uncontested motion for approval of notice of pendency of class action, notice procedures and appointment of a notice administrator (ECF 110), which the Court approved on June 15, 2020. ECF 114 (the "Approval Order"). The appointed notice administer, Gilardi & Co. LLC ("Gilardi"), which mailed notices to 142 unique potential class

members, to 282 brokers, custodial banks, and other institutions, and also to 4,641 institutions listed on the SEC's list of active brokers and dealers. ECF 123. Furthermore, Gilardi, delivered a copy of the notice to be published by the Depository Trust Company on its legal notice system. *Id.*

28. Based upon the initial mailing, Gilardi received indication of an additional 12,366 names of potential Class Members, received three responses that included names of six additional potential Class Members, and received a request from 20 institutions for 10,515 notices that would be forwarded directly to their clients. *Id.* Gilardi also mailed 53 notices as a result of returned mail for which new addresses were identified. In total, Gilardi mailed 28,005 notices to potential Class Members and nominees. *Id.*

29. On July 6, 2020, Gilardi established a case specific toll free telephone helpline and established a website dedicated to provide additional information to potential Class Members. *Id.*

30. On July 13, 2020, the approved summary notice was published in *Investor's Business Daily* and transmitted over *PR Newswire*. *Id.*

V. LEAD PLAINTIFF'S DAMAGES CONSULTANT

31. As part of their comprehensive investigation of the relevant facts and legal issues, Lead Counsel consulted with in-house financial and economic experts, and retained the services of a reputable financial economics firm to provide expert analyses on the issues of loss causation and damages. That consultant assisted with the analysis of the losses associated with the OvaScience share price declines alleged by Lead Plaintiff.

32. The expert consultant further assisted with preparing for settlement negotiations and in developing the Plan of Allocation.

VI. NEGOTIATION OF THE SETTLEMENT

33. Lead Plaintiff and the OvaScience Defendants agreed that it would serve all parties' interests to engage in a formal mediation before a mediator with a track record of mediating complex class action litigation, and an understanding of the law and issues involved in PSLRA actions.

34. On December 23, 2019, the parties informed the Court that they had agreed to participate in a mediation. *See* ECF 73, which was ordered by the Court. ECF 74. Lead Plaintiff and the OvaScience Defendants participated in their first mediation on March 3, 2020, utilizing the services of Michelle Yoshida, an experienced securities litigation mediator, but were unable to reach an agreement. ECF 79. Ms. Yoshida instructed the parties to submit and exchange statements prior to mediation detailing their respective positions and supporting evidence. Lead Counsel prepared Lead Plaintiff's mediation statement, marshaling the facts and documentary evidence obtained through their extensive investigation, including from the then-produced documents, and consultation with an expert. The parties' respective mediation statements thoroughly set forth Lead Plaintiff's and the OvaScience Defendants' positions.

35. After failing to reach a settlement during their first mediation, and in the face of further robust litigation, the Parties thereafter informed the Court on October 15, 2020 of their intent to participate in a second mediation. *See* ECF 124.

36. Again, prior to the Parties' second mediation there were numerous issues about which the Parties disagreed, including: (i) whether the statements made or facts allegedly omitted were material, false, misleading, or actionable; (ii) whether Lead Plaintiff could prove scienter; and (iii) whether Lead Plaintiff could prove loss causation and damages. The Parties' respective mediation statements thoroughly set forth Lead Plaintiff's and Defendants' positions, and were again predicated on documentary evidence obtained in discovery, and also included consultation with an expert.

37. On November 10, 2020, the Parties, through their representatives, along with representatives of Defendants' insurers, participated in a full-day in-person mediation session overseen by Judge Weinstein. During the mediation session, Lead Counsel elaborated upon certain facts set forth in the Second Amended Complaint and in Lead Plaintiff's mediation statement as to, *inter alia*, falsity, scienter, loss causation, and damages. However, the Parties were unable to reach a resolution on that day.

38. The Parties thereafter continued negotiations with the assistance of Judge Weinstein; and in response to a mediator's recommendation, reached an agreement in principle to settle the Action on January 14, 2022. The Parties agreed to settle. Lead Plaintiff agreed to dismiss the litigation against Defendants in return for a cash payment by or on behalf of Defendants of $15,000,000 in cash for the benefit of the Class subject to the negotiation of the terms of a Stipulation of Settlement and approval by the Court.

39. The Parties thereafter memorialized the final terms of settlement in the Stipulation. On March 4, 2022, Lead Plaintiff filed its Unopposed Motion for Preliminary Approval of Class Action Settlement, Re-Certification of the Class, and Approval of Notice to the Class and supporting memorandum of law, together with the Stipulation, the proposed Plan of Allocation, the Notice of (I) Proposed Settlement and Plan of Allocation; (II) Settlement Hearing; and (III) Motion for Attorneys' Fees and Litigation Expenses (the "Notice"), the Proof of Claim and Release Form (the "Proof of Claim," and, collectively with the Notice, the "Notice Package"), the Summary Notice of (I) Proposed Settlement and Plan of Allocation; (II) Settlement Hearing; and (III) Motion for Attorneys' Fees and Litigation Expenses (the "Summary Notice"), and a request that the Court preliminarily certify the Class. *See* ECF 172-174.

40. On April 1, 2022, the Court issued an order preliminarily approving Lead Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement, Re-Certification of the Class, and Approval of Notice to the Class. ECF 178.

41. Pursuant to the Preliminary Approval Order, a Settlement Hearing is scheduled for July 26, 2022. *Id.*

VII. RISKS FACED BY LEAD PLAINTIFF IN THE LITIGATION

42. Based on publicly available information, documents obtained through Lead Counsel's extensive investigation and discovery efforts, discussions with its expert, and a review of the production by Defendants of materials that pertained to a parallel SEC investigation, Lead Plaintiff believes that it would be able to adduce evidence to prove its securities fraud claims. Lead Plaintiff also realizes that it faced considerable risks and defenses in continuing the Litigation against Defendants.

43. As noted below, Lead Counsel faced substantial risks and uncertainties in proving that: (i) Defendants' alleged misstatements were materially false and misleading; (ii) made with scienter; and (iii) caused the alleged damages suffered by the Class, as required by the federal securities laws.

44. Indeed, as stated above, Defendants raised a number of arguments and defenses in their motion to dismiss the Amended Complaint. Lead Plaintiff and its counsel carefully considered the foregoing risks during the months leading up to the Settlement and throughout the settlement discussions with Defendants and Judge Weinstein.

A. Risks Concerning Falsity

45. For Lead Plaintiff to prevail, it first would have to establish that Defendants made an actionable false or misleading statement or material omission. Defendants have maintained that Lead Plaintiff cannot demonstrate that any of their statements were fraudulent, arguing that nothing

they said was false, deceptive, or misleading when those statements were made. Indeed, Defendants point out that AUGMENT was a new, experimental fertility treatment and that Defendants continued to reveal truthful information of the safety and efficacy of AUGMENT as it emerged.

46. Moreover, Defendants argued that many of their statements were not legally actionable because they were forward looking and accompanied by adequate cautionary language and, therefore, protected under the PSLRA's statutory safe harbor.

47. While Lead Plaintiff would have argued that, together with the fact that Defendant Dipp ultimately settled with the SEC, discovery supported its claims showing that AUGMENT safety and efficacy was other than what Defendants publicly revealed, there existed the distinct possibility that Lead Plaintiff would fail to meet its burden of proof given the experimental nature of the treatment, and the limited data that existed as of each of Defendants' public statements.

B. Risks Concerning Scienter

48. As a threshold matter, Defendants contend that the Second Amended Complaint did not sufficiently allege scienter. In response, Lead Plaintiff argued that Defendants knew but failed to disclose the true facts concerning the efficacy and commercial viability of AUGMENT and the Company's financial prospects. Moreover, a finding of scienter was supported by the documents reviewed in advance of mediation, which Lead Plaintiff would argue was further bolstered by Defendants' alteration of their reporting practices after they began selling AUGMENT.

49. While Lead Plaintiff believes it can establish scienter as to the alleged misstatements and omissions, it is impossible and, indeed, imprudent to ignore the substantial risk that a jury could disagree. Lead Plaintiff anticipates that Defendants would have argued on summary judgment and again at trial that scienter was lacking because, among other things, there was insufficient motive to support a strong inference of scienter and that Lead Plaintiff would be unable to show that Defendants had actual knowledge their forward-looking statements regarding AUGMENT

treatments were false at the time the statements were made. Moreover, the Defendants maintained that any intent to deceive investors could not be established because they took considerable care in their public statements, consulting with an array of knowledgeable business operatives and other legal professionals who guided what Defendants reported to the public.

50. At bottom, such questions of scienter are often reduced to the jury's evaluation of the credibility of numerous witnesses. Here, however, there is a significant risk that Lead Plaintiff's arguments would never reach the jury. Even if they did, the risk that Defendants' arguments would resonate with the Court and a jury was very real given that Defendant Dipp did not admit liability in the SEC settlement.

C. Risks Concerning Loss Causation and Damages

51. Lead Plaintiff also recognized the risk of proving loss causation and damages. To establish loss causation, Lead Plaintiff would have to plead and ultimately prove "a causal connection between the material misrepresentation and the loss." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005).

52. Aside from loss causation, the issue of damages would have been hotly disputed and clearly would have been the subject of expert testimony proffered by all parties. The damages assessments of experts retained by the parties would surely vary substantially and the existence and amount of damages would be uncertain. *See, e.g.*, *City of Providence v. Aeropostale, Inc.*, 2014 U.S. Dist. LEXIS 64517, at *24 (S.D.N.Y. May 9, 2014) ("Undoubtedly, the Parties' competing expert testimony on damages would inevitably reduce the trial of these issues to a risky 'battle of the experts' and the 'jury's verdict with respect to damages would depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable.'") (citation omitted), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015). Indeed, when, as here, the plaintiffs' damage theories rest primarily on the testimony and reports of experts, the plaintiffs face a

serious risk of having their damage theories rejected by the court on a *Daubert* motion or by the jury when it must balance the credibility of competing experts.

D. Risks Concerning the Expense, Delay, and Uncertainty of Further Litigation

53. If not for this Settlement, the Litigation would have continued to be highly contested by the parties at each significant stage, if the case even proceeded from its current posture. Moreover, continued litigation would be complex, costly, and lengthy. Summary judgment was to be hotly contested, and any following trial would take weeks to complete, even without taking into account pre- and post-trial motions, and any favorable ruling to one party would almost certainly be appealed.

54. Moreover, OvaScience no longer exists as a going concern and its limited insurance proceeds continued to waste, further reducing the amount available to the Class even if Lead Plaintiff was successful at trial on all elements and any following appeal. At bottom, the longer the Litigation continued, the more the available insurance proceeds would be reduced by defense costs, resulting in the possibility that most, if not all, available insurance policies would be exhausted before any verdict, or later settlement.

VIII. LEAD PLAINTIFF'S COMPLIANCE WITH THE COURT'S PRELIMINARY APPROVAL ORDER

55. Pursuant to the Preliminary Approval Order, the Court appointed Gilardi & Co. LLC ("Gilardi") as Claims Administrator in the Litigation and instructed Gilardi to, among other things, disseminate by mail copies of the Notice Package and to publish the Summary Notice.

56. The Notice approved by the Court provides potential Class Members with information about the essential terms of the Settlement and, among other things: (i) their right to exclude themselves from the Class; (ii) their right to object to any aspect of the Settlement, the Plan of Allocation, or the Fee and Expense Application; and (iii) the manner and deadline for submitting a

Proof of Claim in order to be eligible for a payment from the net proceeds of the Settlement. Additionally, the Notice provides the deadlines for objecting to the Settlement or seeking exclusion from the Class and advises potential Class Members of the Settlement Hearing scheduled before this Court. The Notice also informs Class Members of Lead Counsel's intention to apply for an award of attorneys' fees of 33-1/3% of the Settlement Amount, plus interest, and for payment of litigation costs and expenses incurred in an amount not to exceed $875,000, plus interest.

57. As previously noted, on July 6, 2020, Gilardi began mailing the Notice of Pendency to potential Class Members as well as banks, brokerage firms, and other third-party nominees. *See* ECF 123, ¶¶5-9. As of October 2, 2020, Gilardi mailed a total of 28,005 copies of the Notice of Pendency to potential Class Members and nominees. *Id.*, ¶10. To disseminate the Notice of Pendency, Gilardi obtained the names and addresses of potential Class Members from listings provided by OvaScience's transfer agent and from banks, brokers, and other nominees. *Id.*, ¶¶5-9.

58. As required by the Court's Preliminary Approval Order, beginning on April 22, 2022, Lead Plaintiff, through Gilardi, notified Class Members of the Settlement by mailing a copy of the Notice to Class Members and their nominees. *See* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Murray Decl."), submitted herewith.

59. The Court-approved Notice also requires brokers/nominees, within seven calendar days, to either (i) request additional copies of the Notice to send to the beneficial owners of the securities, or (ii) provide to Gilardi the names and addresses of such persons and entities.

60. In the aggregate, as of June 21, 2022, Gilardi has disseminated 32,468 copies of the Notice to Class Members and their nominees. *See* Murray Decl., ¶11.

61. In addition, on May 6, 2022, the Summary Notice was published in *The Wall Street Journal* and over the *PR Newswire*. *See* Murray Decl., ¶12. Information regarding the Settlement, including copies of the Notice and Proof of Claim, was posted on the website established by Gilardi specifically for the Notice of Pendency and updated for this Settlement. This method of giving notice, previously approved by the Court, is appropriate because it directs notice in a "reasonable manner to all class members who would be bound by the [proposed] judgment." Fed. R. Civ. P. 23(e)(i).

62. The Notice advises members of the Class of the essential terms of the Settlement, sets forth the procedure for objecting to or opting out of the Settlement, and provides specifics on the date, time, and place for the Settlement Hearing.

63. The Notice also contains information regarding Lead Counsel's Fee and Expense Application, including an award to Lead Plaintiff, and the proposed Plan of Allocation. As explained in the Settlement Brief, the Notice fairly apprises Class Members of their rights with respect to the Settlement, and therefore is the best notice practicable under the circumstances, and complies with the Court's Preliminary Approval Order, Rule 23 of the Federal Rules of Civil Procedure, the PSLRA, and due process.

64. Pursuant to the terms of the Preliminary Approval Order, the deadline for Class Members to submit objections to the Settlement, the Plan of Allocation, or the Fee and Expense Application, or to request exclusion from the Class is July 5, 2022. Preliminary Approval Order, ECF 178. Although that date has not yet passed, Lead Counsel has received no objections to the Settlement and only two requests for exclusion from the Class. Murray Decl., ¶18.

65. Should any objections to the Settlement or additional requests for exclusion be received prior to the July 5, 2022 deadline, Lead Counsel will address them in its reply brief, which will be filed no later than July 19, 2022.

IX. PLAN OF ALLOCATION

66. Pursuant to the Preliminary Approval Order, and as set forth in the Notice, all Class Members who wish to participate in the distribution of the Settlement proceeds must submit a valid Proof of Claim, including all required information, postmarked (if mailed) or received (if submitted online) on or before August 22, 2022. As provided in the Notice, after deduction of Court-awarded attorneys' fees and expenses, notice and administration costs, and all applicable taxes, the balance of the Settlement Fund (the "Net Settlement Fund") will be distributed according to the Plan of Allocation. To date, no Class Member has objected to the Plan of Allocation.

67. The proposed Plan of Allocation, which was set forth and explained in full in the Notice, is designed to achieve an equitable and rational distribution of the Net Settlement Fund, but it is not a formal damages analysis that would be submitted at trial. Lead Counsel developed the Plan of Allocation in close consultation with Lead Plaintiff's consulting damages expert and it is based on the out-of-pocket measure of damages, *i.e.*, the difference between what Class Members paid for OvaScience common stock during the Class Period and what they would have paid had the misstatements not been made or omissions withheld. *See Medoff v. CVS Caremark, Corp.*, 2016 WL 633228, at *7 (D.R.I. Feb. 17, 2016). Lead Counsel, therefore, believes that the Plan of Allocation provides a fair and reasonable method to equitably distribute the Net Settlement Fund among Authorized Claimants.

68. The Plan of Allocation provides for distribution of the Net Settlement Fund among Authorized Claimants on a *pro rata* basis based on "Recognized Loss" formulas tied to the amount of alleged artificial inflation in the share prices at various times during the Class Period, as

quantified by Lead Plaintiff's consulting damages expert. Lead Plaintiff's consultant analyzed the movement of the price of OvaScience common stock and took into account the portion of the stock price drops attributable to the alleged fraud. The Plan of Allocation ensures that the Net Settlement Fund will be fairly and equitably distributed based on the amount of inflation in the price of OvaScience common stock during the Class Period that was attributable to the alleged wrongdoing. The Plan of Allocation also incorporates the 90-day "look-back" provision required by the PSLRA.

69. Gilardi, under Lead Counsel's direction, 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. Calculation of Recognized Loss will depend upon several factors, including when the claimants purchased or acquired OvaScience common stock during the Class Period, and whether the stock was sold during the Class Period or thereafter, and if so, when.

70. In sum, the proposed Plan of Allocation, developed in consultation with Lead Plaintiff's damages consultant, was designed to allocate the Net Settlement Fund fairly and rationally among Authorized Claimants. Accordingly, Lead Counsel respectfully submits that the proposed Plan of Allocation is fair, reasonable, and adequate, and should be approved. No objections to the proposed Plan of Allocation have been filed by Class Members.

X. LEAD COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND PAYMENT OF EXPENSES, CHARGES AND COSTS

71. Lead Counsel, on behalf of all counsel for Lead Plaintiff in this Litigation, is requesting an attorneys' fee award of 33-1/3% of the Settlement Amount, plus interest. The requested 33-1/3% fee also "falls squarely within what is recognized in this circuit as the range of reasonable [percentage of fund] amounts." *See Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 350 (D. Mass. 2015), *aff'd*, 809 F.3d 78 (1st Cir. 2015).

72. Lead Counsel also request payment of litigation expenses, charges and costs in connection with the prosecution of the Litigation from the Settlement Fund in the amount of $813,208.13, plus any accrued interest. The total payment requested for Lead Counsel's expenses is below the $875,000 maximum expense amount that the Class was advised could be requested.

A. The Risks and Unique Complexities of the Litigation

73. This Litigation presented substantial challenges from its outset. The specific risks that were faced in proving Defendants' liability and damages are detailed herein.

74. Lead Counsel respectfully submits that any assessment of the proposed fee request should appropriately account for those significant risks. Given that an excellent result was achieved for the Class in the face of these risks, Lead Counsel should be rewarded accordingly. Indeed, without the efforts and skill of Lead Counsel, this Settlement would not have been consummated.

75. The foregoing risks are in addition to the more typical risks accompanying securities class action litigation, including that this Litigation was undertaken on a contingent basis.

76. In that regard, Lead Counsel understood from the outset that it was embarking on a complex, expensive, and lengthy litigation with no guarantee of being compensated for the substantial investment of time and money the case would require. In undertaking that responsibility, Lead Counsel was obligated to ensure that sufficient resources were dedicated to the prosecution of the Litigation, and that funds were available to compensate staff and to cover the considerable costs that a case such as this requires. With an average lag time of several years for these cases to conclude, the financial burden on contingent-fee counsel is far greater than on a firm that is paid on an ongoing basis. Indeed, Plaintiff's Counsel have received no compensation during the course of the Litigation, but have incurred more than 18,500 hours of time, for a total lodestar of

$12,838,290.25, and have incurred $813,208.13 in expenses, charges and costs in prosecuting the Litigation for the benefit of the Class.[3]

77. Lead Counsel also bore the risk that no recovery would be achieved (or that a judgment could not be collected, in whole or in part). Even with the most vigorous and competent efforts, success in contingent-fee litigation, such as this, is never assured.

78. Lead Counsel knows from experience that the commencement of a class action does not guarantee a recovery. To the contrary, it takes hard work and diligence by skilled counsel to develop the facts and theories that are needed to sustain a complaint or win at trial, or to convince sophisticated defendants to engage in serious settlement negotiations at meaningful levels.

79. Lead Counsel is aware of many hard-fought lawsuits where because of the discovery of facts unknown when the case was commenced or changes in the law during the pendency of the case, or a decision of the court or a jury verdict following a trial on the merits, excellent professional efforts of members of the plaintiffs' bar produced no fee for counsel.

80. Moreover, even if Lead Plaintiff successfully opposed a motion for summary judgment, this is not a guarantee that Lead Plaintiff would have prevailed at trial. Indeed, while only a modest number of securities class actions have been tried before a jury, some have been lost in their entirety. *See, e.g.*, Civil Trial Mins., *In re JDS Uniphase Sec. Litig.*, No. C-02-1486 CW (EDL) (N.D. Cal. Nov. 27, 2007), ECF 1885. Additionally, a plaintiff who succeeds at trial still may find its verdict overturned on appeal. *See, e.g.*, *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408

[3] *See* Declaration of Stephen R. Astley Filed on Behalf of Robbins Geller Rudman & Dowd LLP in Support of Application for Award of Attorneys' Fees and Expenses ("Robbins Geller Decl."), Exs. A-B; Declaration of Michael E. Criden Filed on Behalf of Criden & Love in Support of Application for Award of Attorneys' Fees and Expenses ("Criden Decl."), Exs. A-B; and Declaration of Alan L. Kovacs Filed on Behalf of Law Office of Alan L. Kovacs in Support of Application for Award of Attorneys' Fees and Expenses ("Kovacs Decl."), Exs. A-B. Collectively, the Robbins Geller Decl., the Criden Decl., and the Kovacs Decl. are referred to as the "Fee Decls." or the "Fee Declarations."

(7th Cir. 2015) (major portion of plaintiffs' verdict reversed on appeal); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1219 (10th Cir. 1996) (overturning plaintiffs' jury verdict obtained after two decades of litigation); *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988) (reversing plaintiffs' jury verdict for securities fraud); *Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir. 1997) (same). And, even when a plaintiff wins a jury verdict, it still may face substantial challenges in securing a recovery. *See, e.g.*, *In re Bank Atlantic Bancorp, Inc. Sec. Litig.*, 2011 WL 1585605 (S.D. Fla. Apr. 25, 2011), *aff'd sub nom. Hubbard v. Bank Atlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (granting defendants' post-trial for motion for judgment as a matter of law following jury verdict for plaintiff).

81. Courts have held repeatedly that it is in the public interest to have experienced and able counsel enforce the securities laws and regulations pertaining to the duties of officers and directors of public companies. *See, e.g.*, *Cohn v. Nelson*, 375 F. Supp. 2d 844, 865 (E.D. Mo. 2005) ("The Supreme Court has emphasized that while private actions provide '"a most effective weapon in the enforcement" of the securities laws and are "a necessary supplement to [SEC] action,"' it is imperative that the filing of contingent class action and derivative lawsuits not be chilled by the failure to award attorneys' fees or by the imposition of fee awards that fail to adequately compensate counsel for the risks of pursuing such litigation, and the benefits that would not otherwise be achieved.") (citations omitted). Vigorous private enforcement of the federal securities laws and state corporation laws can occur only if the private plaintiff can obtain some semblance of parity in representation with that available to large corporate interests. If this important policy is to be carried out, courts should award fees that will adequately compensate private plaintiff's counsel, taking into account the enormous risks undertaken with a clear view of the economics of a securities class action.

82. When counsel undertook to act for the Class in this matter, it was aware that the only way it would be compensated was to achieve a successful result. The benefits conferred on the members of the Class by the Settlement are noteworthy in that a common fund worth $15 million (plus interest) was obtained for the Class despite the existence of substantial risks and Defendants' zealous and vigorous defense.

83. Here, diligent efforts by counsel in the face of substantial risks and uncertainties have resulted in a significant and immediate recovery for the benefit of the Class. In circumstances such as these, and in consideration of the substantial effort expended and the very favorable result achieved, the requested fee of 33-1/3% of the Settlement Fund and payment of $813,208.13 in expenses, charges and costs is reasonable and should be approved.

B. A Lodestar Cross-Check Supports the Requested Award of Attorneys' Fees

84. A lodestar cross-check supports the requested attorneys' fees. A lodestar cross-check is performed by multiplying the number of hours expended in the litigation by the hourly rates of the attorneys. While a lodestar cross-check is often a useful tool in determining the reasonability of a fee request, whether or not to perform one is within the Court's discretion.[4]

85. As more fully set forth above, the Litigation settled only after Lead Counsel conducted a comprehensive investigation into the Class' claims; researched and prepared the detailed Complaints; fully briefed Defendants' motion to dismiss; moved for and obtained class certification; requested and reviewed millions of pages of documents produced by Defendants and

[4] Additional work will be required of Lead Counsel on an ongoing basis, including: preparation for, and participation in, the Settlement Hearing; responding to any objections; supervising the claims administration process being conducted by the Claims Administrator (including responding to inquiries from Class Members); and supervising the distribution of the Net Settlement Fund to Class Members who have submitted valid Proofs of Claim. Lead Counsel will ***not*** seek payment for this work.

third parties; conducted and defended depositions; prepared thorough mediation materials; and engaged in an arm's-length mediation process. At all times throughout the pendency of the Litigation, Lead Counsel's efforts were driven and focused on advancing the Litigation to bring about the most successful outcome for the Class, whether through settlement or trial, by the most efficient means necessary.

86. Here, Plaintiffs' Counsel have expended over 18,500 hours in the prosecution and investigation of the Litigation. *See* Robbins Geller Decl., Ex. A; Criden Decl., Ex. A; Kovacs Decl., Ex. A. The lodestar calculates the time spent by the attorneys and other professionals employed by counsel, compiled from contemporaneous daily time records regularly prepared and maintained by counsel, multiplied by the hourly rate for each timekeeper.

87. The 2022 hourly billing rates of Lead Counsel in this Litigation range from $850 to $1,080 for members/partners and $450 to $650 for associate attorneys. *See* Robbins Geller Decl., Ex. A.[5] Although Robbins Geller does not assert that hourly clients regularly pay these rates, the foregoing hourly rates have been submitted to and approved by district courts around the country.

88. The resulting lodestar is $12,838,290.25. Pursuant to a lodestar "cross-check," the requested fee of 33-1/3% of the Settlement Fund (which equates to $5 million) results in a negative "multiplier" of 0.39 on the lodestar, which does not include any time that will necessarily be spent obtaining approval of and thereafter administering the Settlement. As detailed in Lead Counsel's brief in support of the fee request, this level of multiplier is well below the range of multipliers approved in this Circuit and elsewhere.

[5] Particular attorney billing rates are determined by, among other things, the experience level and expertise of the attorney in question. *See* Robbins Geller Decl., ¶4.

C. Standing and Expertise of Counsel

89. Robbins Geller, Court-appointed Lead Counsel, is highly experienced in complex securities class actions and has successfully prosecuted numerous securities class action suits throughout the country. *See* Robbins Geller Decl., Ex. G. As detailed therein, Robbins Geller has been approved by courts to serve as lead counsel in scores of securities class actions throughout the United States. Moreover, the firm has served as lead counsel in numerous high-profile matters which, during the last several years alone, have recovered billions of dollars for investors.

D. Standing and Caliber of Defense Counsel

90. OvaScience was represented throughout this action by Mintz Levin, one of the finest law firms in the country, and which possesses substantial resources and expertise in the defense of complex securities litigation. This prominent law firm and its attorneys zealously provided its clients with a very vigorous and aggressive defense of this Litigation. In the face of this formidable opposition, Lead Counsel developed the case and successfully negotiated the Settlement.

E. Request for Litigation Expenses, Costs and Charges

91. Plaintiff's Counsel also seek payment from the Settlement Fund of $813,208.13 in litigation expenses, charges and costs reasonably and necessarily incurred by them in connection with commencing and prosecuting the claims against Defendants.

92. From the beginning of the case, Plaintiff's Counsel were aware that they might not recover any of their expenses, and, at the very least, would not recover anything until the Litigation was successfully resolved. Thus, counsel was motivated to, and did, take steps to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of the case. The expenses, charges and costs for which Plaintiff's Counsel seek payment are the types of expenses that are necessarily incurred in litigation and routinely charged to litigants who are billed by the

hour. These expenses include, among others, travel costs, computer-based research, and mediator and expert fees.

93. The Fee Declarations summarize by category expenses, charges and costs incurred by Plaintiff's Counsel in connection with the prosecution of this Litigation. These expenses, charges and costs are reflected on the books and records maintained by Plaintiff's Counsel. These books and records are prepared from expense vouchers, check records, and other source materials, and are an accurate record of the expenses incurred.

94. All of the litigation expenses, charges and costs incurred by Plaintiff's Counsel, which total $813,208.13, were necessary to the successful prosecution and resolution of the claims against Defendants.

F. The Reaction of the Class to the Fee and Expense Application

95. As of June 21, 2022, over 32,468 Notice Packages have been mailed to potential Class Members and nominees. *See* Murray Decl., ¶11. The Notice stated that Lead Counsel would seek an award of attorneys' fees not to exceed to 33-1/3% of the Settlement Amount, plus interest, and payment of expenses, charges and costs in an amount not greater than $875,000, plus interest. Additionally, the Summary Notice was published in *The Wall Street Journal* and transmitted over *PR Newswire*. *Id.*, ¶12. The Notice also has been available on the Settlement website maintained by Gilardi. *Id.*, ¶14.

96. While the deadline set by the Court for Class Members to object to the requested fees and expenses, charges and costs has not yet passed, to date there have been no objections to the requested fee, no objections to the requested expenses, and no objection to Lead Plaintiff's expense application. Lead Counsel will respond to any objections received by the July 5, 2022 deadline in the reply papers, which are due on July 19, 2022.

Attached are true and correct copies of the following exhibits:

Exhibit A: Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review* (NERA Jan. 25, 2022); and

Exhibit B: Laarni T. Bulan & Laura E. Simmons, *Securities Class Action Settlements: 2021 Review and Analysis* (Cornerstone Research 2022).

XI. CONCLUSION

In view of the certain and meaningful recovery to the Class and the substantial risks of continued litigation, as described above and in the accompanying memoranda of law, Lead Plaintiff and its counsel respectfully submit that the Settlement should be approved as fair, reasonable, and adequate, and that the proposed Plan of Allocation should likewise be approved as fair, reasonable, and adequate. In view of the significant recovery achieved in the face of substantial risks, the quality of work performed, the contingent nature of the fee, and the standing and experience of Plaintiff's Counsel, as described above and in the accompanying memoranda of law, Lead Counsel respectfully request that the Court award attorneys' fees in the amount of 33-1/3% of the Settlement Amount, plus expenses, charges and costs in the amount of $813,208.13, plus the interest earned thereon.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21st day of June, 2022, at Boca Raton, Florida.

STEPHEN R. ASTLEY

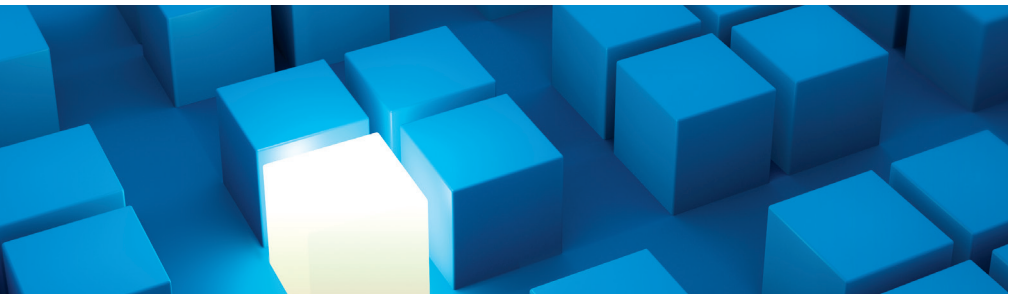
CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system will, be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants, if any, on June 21, 2022.

s/ Stephen R. Astley
STEPHEN R. ASTLEY

NERA
ECONOMIC CONSULTING

25 January 2022



Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review

Over 10% of New Federal Filings Were Related to Special Purpose Acquisition Companies

Substantially Fewer Merger Objections Filed, Leading to a Decline in Aggregate New Filings

Total Resolutions, Average and Median Settlement Values Declined

By Janeen McIntosh and Svetlana Starykh

Insight in Economics™

Foreword

I am excited to share NERA's Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review with you. This year's edition builds on work carried out over three decades by many members of NERA's Securities and Finance Practice. This year's report continues our analyses of trends in filings and settlements and presents new analyses related to current topics such as special purpose acquisition companies. Although space does not permit us to present all the analyses the authors have undertaken while working on this year's edition or to provide details on the statistical analysis of settlement amounts, we hope you will contact us if you want to learn more about our research or our work related to securities litigations. On behalf of NERA's Securities and Finance Practice, I thank you for taking the time to review our work and hope you find it informative.

Dr. David Tabak
Managing Director

Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review

Over 10% of New Federal Filings Were Related to Special Purpose Acquisition Companies

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Total Resolutions, Average and Median Settlement Values Declined

By Janeen McIntosh and Svetlana Starykh[1]

25 January 2022

Introduction

For the first time since 2016, fewer than 300 new federal securities class action suits were filed.[2] There were 205 cases filed in 2021, a decline from the 321 suits filed in 2020. Although substantially lower than the number of cases filed annually between 2017 and 2019, the 2021 level is well within the pre-2017 historical range. The decline in the aggregate number of new cases filed was driven by the notable decrease in the number of merger-objection suits in 2021. More specifically, new merger-objection filings declined by more than 85% between 2020 and 2021. Of the new cases filed in 2021, over 30% were filed against defendants in the electronic technology and services sector and 40% were filed in the Second Circuit. The most common allegation included in the complaints was misled future performance while the proportion of cases with an allegation related to merger-integration issues doubled, driven primarily by the numerous filings related to special purpose acquisition companies. In 2021, there were 20 securities class action cases filed with a COVID-19-related claim alleged in the complaint, a decrease from the 33 suits filed in 2020.

Of the 239 cases resolved in 2021, 153 were dismissed and 86 resolved through a settlement. This is a decline in total dismissed cases and total resolutions relative to 2020. Compared to 2020, there was an increase in both dismissed and settled non-merger-objection cases. There was a substantial decrease in merger-objection cases dismissed and one more such suit settled than in 2020. This decline in the number of dismissed merger-objection cases not only offset the increase in standard case resolutions, but also led to a lower aggregate number of cases resolved in 2021.

An evaluation of securities class action suits filed and resolved between 1 January 2000 and 31 December 2021 reveals the vast majority had a motion to dismiss filed. Of the 96% of cases with a motion to dismiss filed, a decision was reached in 73% of the cases prior to resolution of the case. Of the cases with a decision on a motion to dismiss, approximately 56% were granted. Among the same group of cases, a motion for class certification was filed in only 16% of the securities class actions. Of that 16%, a decision was reached in 56% of the cases prior to the case resolution, with the motion for class certification granted in 83% of the cases with a decision.

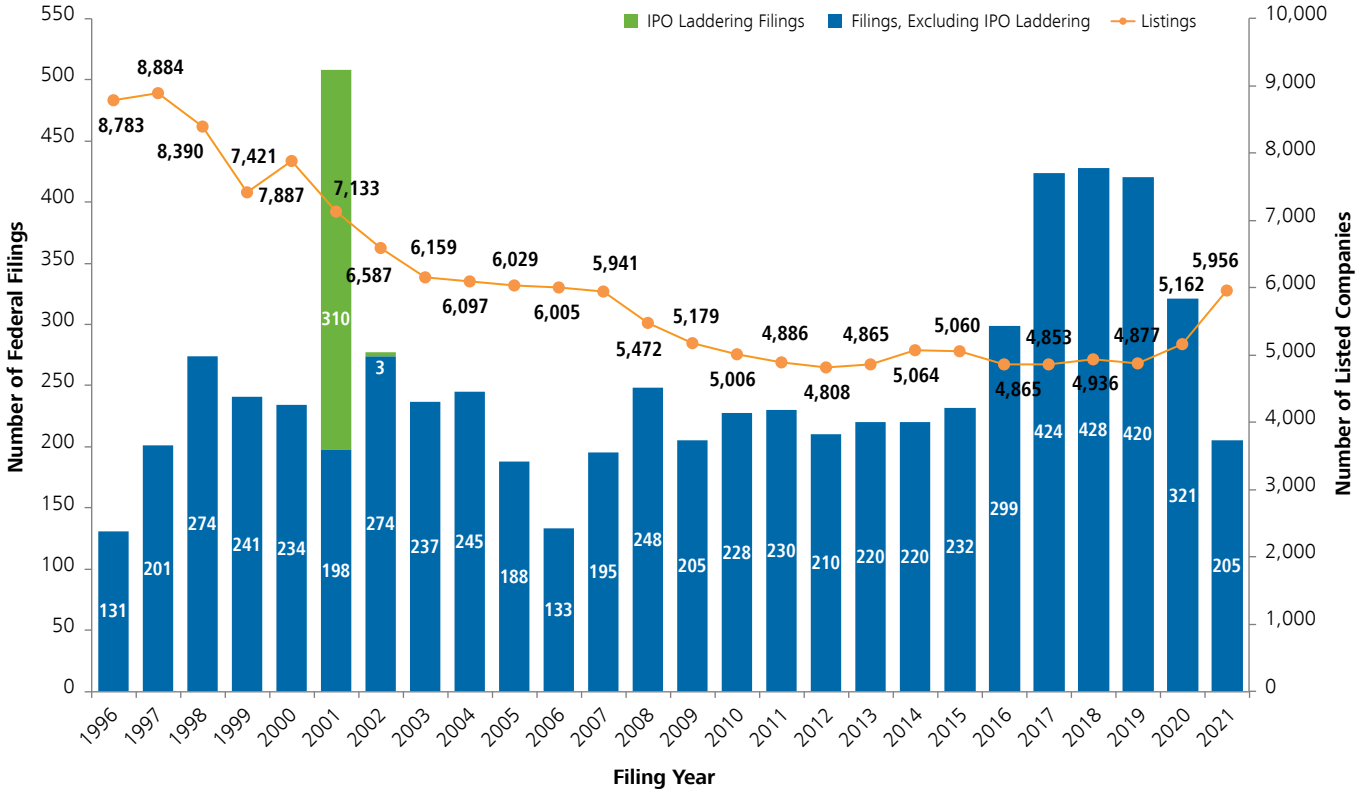
In 2021, aggregate settlements amounted to $1.8 billion, with more than 50% of this amount associated with the top 10 highest settlements for the year. The average settlement value decreased by over 50% in 2021 to $21 million, the lowest recorded average in the last 10 years. Given that there were no "mega" settlements (settlements of $1 billion or greater) in 2021, the average settlement value after excluding "mega" settlements remains unchanged at $21 million. For 2021, the median settlement value was $8 million, the lowest recorded median value since 2017. The median annual settlement value for 2021 is approximately 40% lower than the inflation-adjusted median value observed in the prior three years.

Trends in Filings

Following the passage of PSLRA in 1996, there have been over 100 federal securities class action (SCA) suits filed each year. With the exception of 2001, when numerous IPO laddering cases were filed, there were fewer than 300 new cases filed annually between 1996 and 2016. In 2017, there were substantially more new suits filed, with more than 415 annual cases recorded—a trend that continued through 2019. This uptick in filings was mostly due to the considerable increase in merger-objection cases. However, in both 2020 and 2021, this higher annual level of new cases filed did not persist.[3]

For the second consecutive year, new securities class action filings declined, falling to the lowest level since 2009. In 2021, there were 205 new cases filed, which is more than 50% lower than the annual levels of filings recorded each year between 2017 and 2019. See Figure 1.

Figure 1. **Federal Filings and Number of Companies Listed in the United States**
January 1996–December 2021

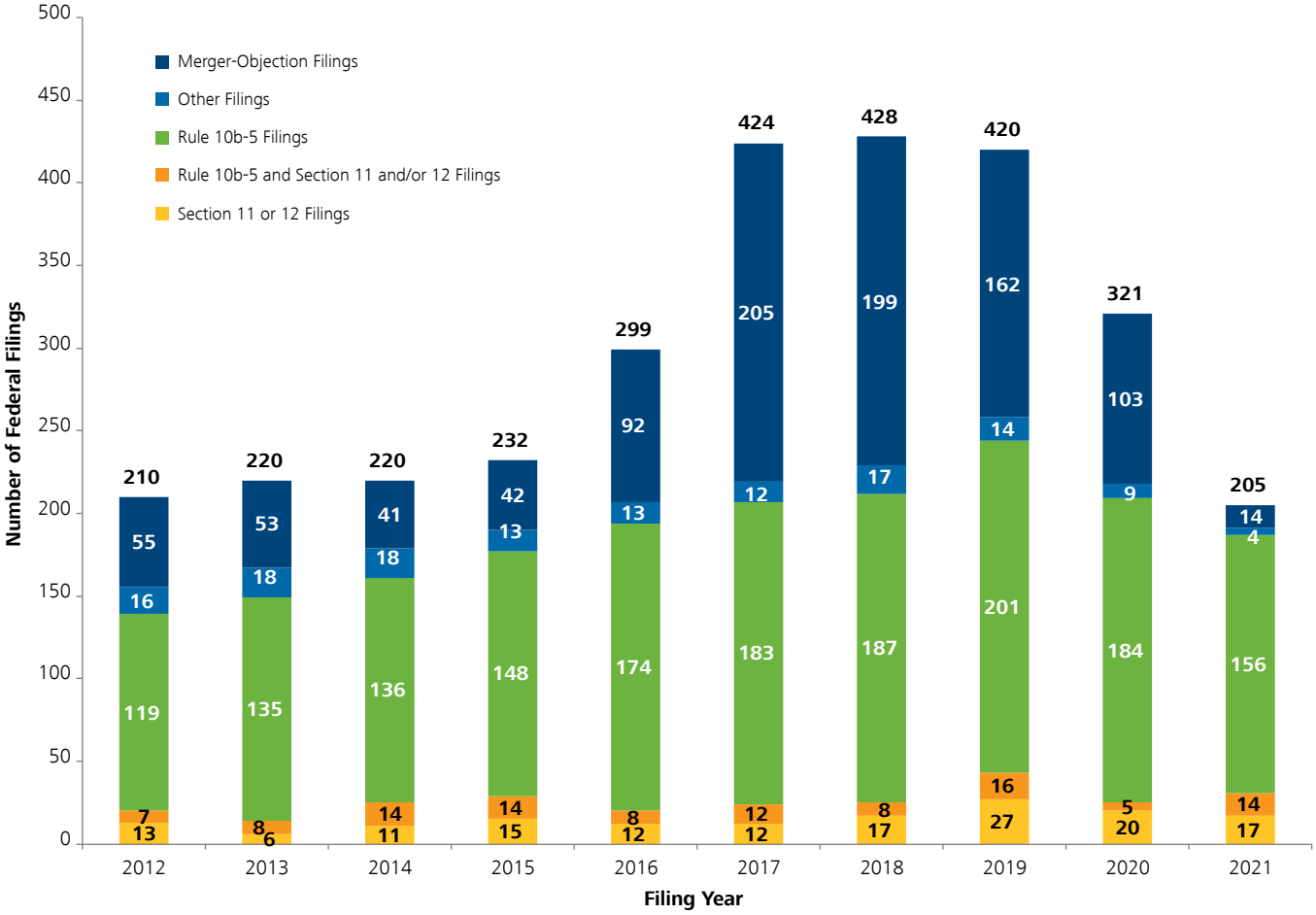


Note: Listed companies include those listed on the NYSE and Nasdaq. Listings data obtained from World Federation of Exchanges (WFE). The 2021 listings data is as of September 2021.

In addition to analyzing trends in aggregate filings, we also evaluated the number of filings relative to the number of companies listed on the NYSE and Nasdaq exchanges. There were 5,956 listed companies as of September 2021, which represents a 15% increase over the 2020 level and a noteworthy change from the minor year-to-year fluctuations observed between 2016 and 2019.

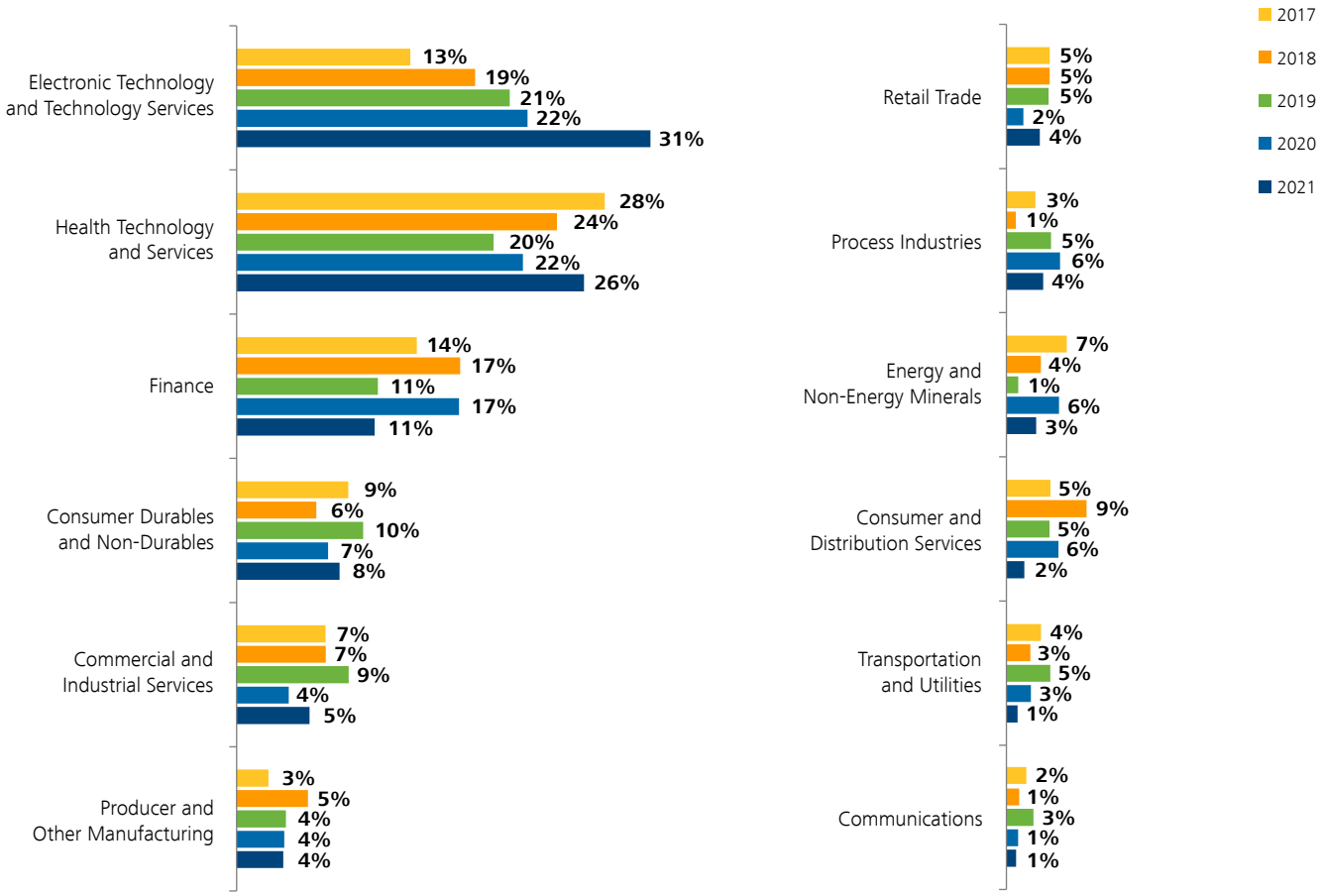
Even though there was a significant decrease in new federal SCA filings in 2021, the decline was not consistent across all case types. While new filings of Rule 10b-5 and Section 11 and/or Section 12 cases increased, new filings of merger objections, Rule 10b-5 only, Section 11 and/or 12 only, and other SCA cases declined. The most notable was the decline in merger-objection filings, which decreased by more than 85% from 103 new filings in 2020 to only 14 new filings in 2021. See Figure 2.

Figure 2. **Federal Filings by Type**
January 2012–December 2021



Since 2018, the percentage of securities class action suits filed against defendants in the electronic technology and services sector has shown steady growth. Of the new cases filed in 2017, less than 15% were filed against defendants in the electronic technology and services sector compared to over 30% against defendants in the same sector in 2021. Between 2019 and 2021, the percentage of securities class action suits filed against defendants in the health technology and services sector also increased from 20% to 26%. See Figure 3.

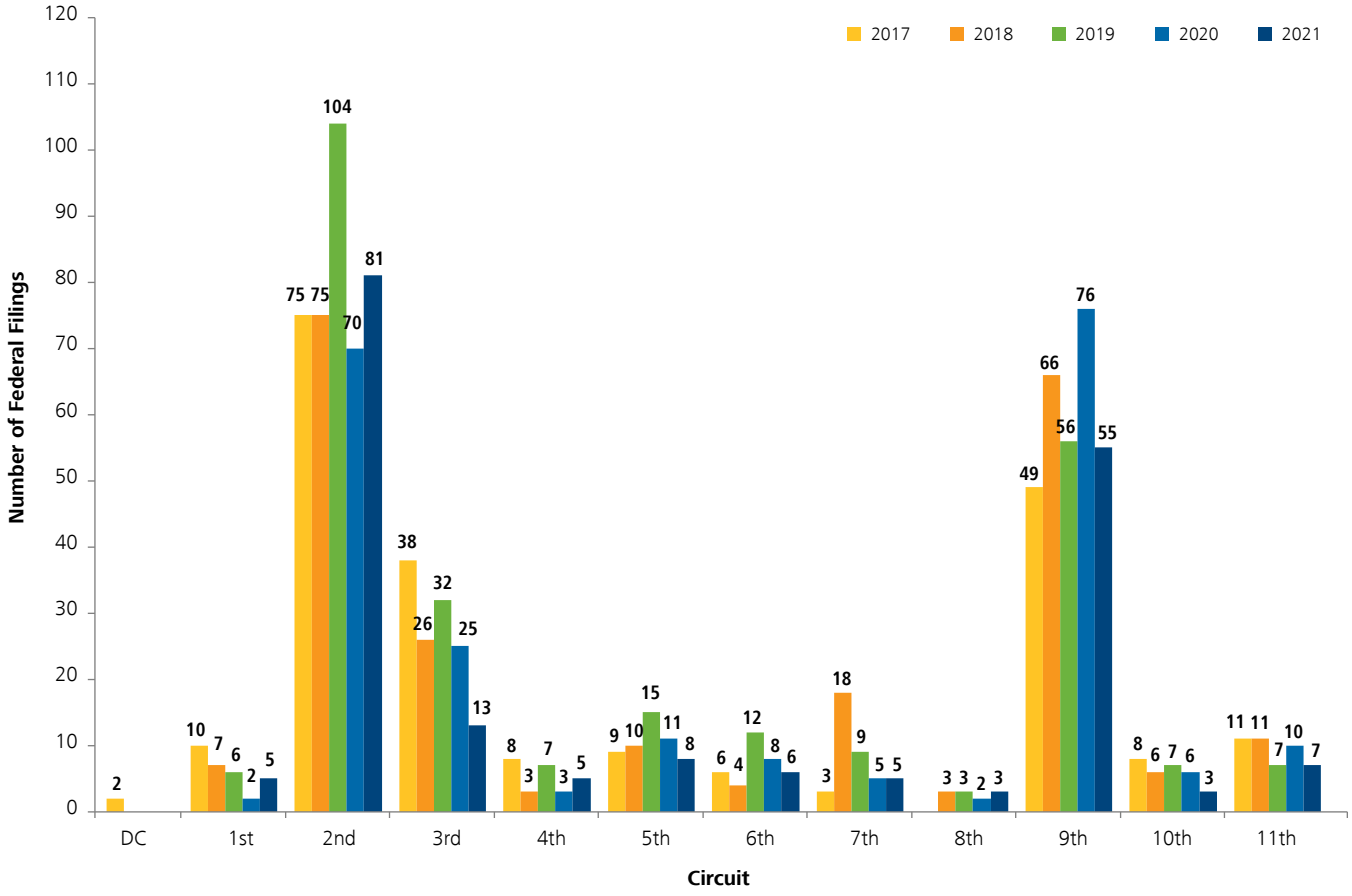
Figure 3. **Percentage of Federal Filings by Sector and Year**
Excludes Merger Objections
January 2017–December 2021



Note: This analysis is based on the FactSet Research Systems, Inc. economic sector classification. Some of the FactSet economic sectors are combined for presentation.

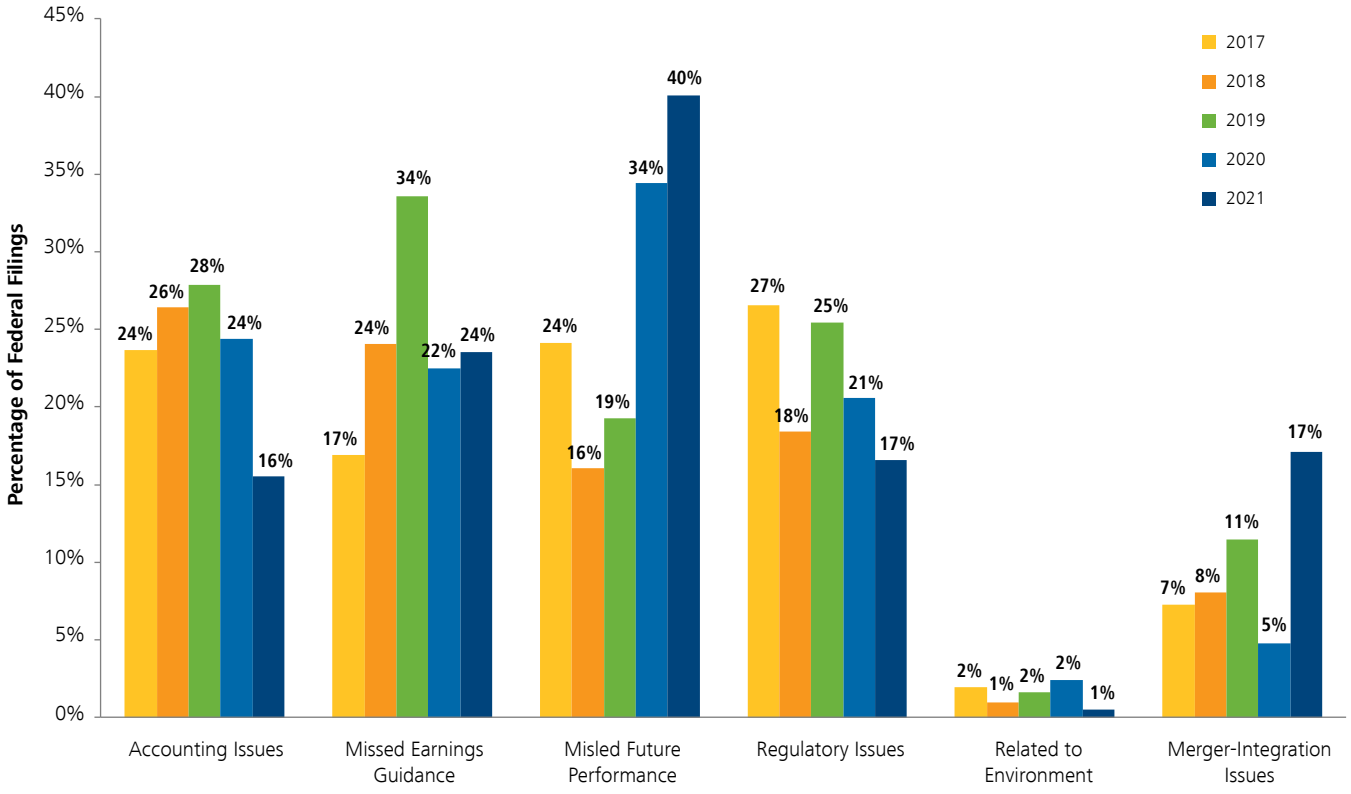
In 2020, we observed a spike in new federal securities class action filings in the Ninth Circuit. This pattern did not persist in 2021. In 2021, the Second Circuit received the highest number of new SCA cases filed while the number of filings in the Ninth Circuit returned to pre-2020 levels. However, the number of new filings in the Third Circuit declined to a five-year low with fewer than 15 cases filed in this circuit in 2021. See Figure 4.

Figure 4. **Federal Filings by Circuit and Year**
Excludes Merger Objections
January 2017–December 2021



Of the new federal securities class action cases filed in 2021, 40% alleged violations related to misleading future performance, the most common alleged violation for the year.[4] Allegations of violations related to missed earnings guidance continue to be a common allegation, with 24% of cases involving this claim. The percentage of cases alleging violations of accounting issues and regulatory issues declined in 2021, each occurring in less than 20% of new cases filed. In 2021, there was an uptick in the number of SCA filings with an allegation related to merger-integration issues included in the complaint. This increase was driven by the substantial number of cases involving special purpose acquisition companies (SPAC) filed in 2021. Excluding these SPAC cases, only 5% of cases included an allegation related to merger-integration issues. See Figure 5.

Figure 5. **Allegations**
Shareholder Class Actions with Alleged Violations of Rule 10b-5, Section 11, and/or Section 12
January 2017–December 2021



Event-Driven and Special Cases

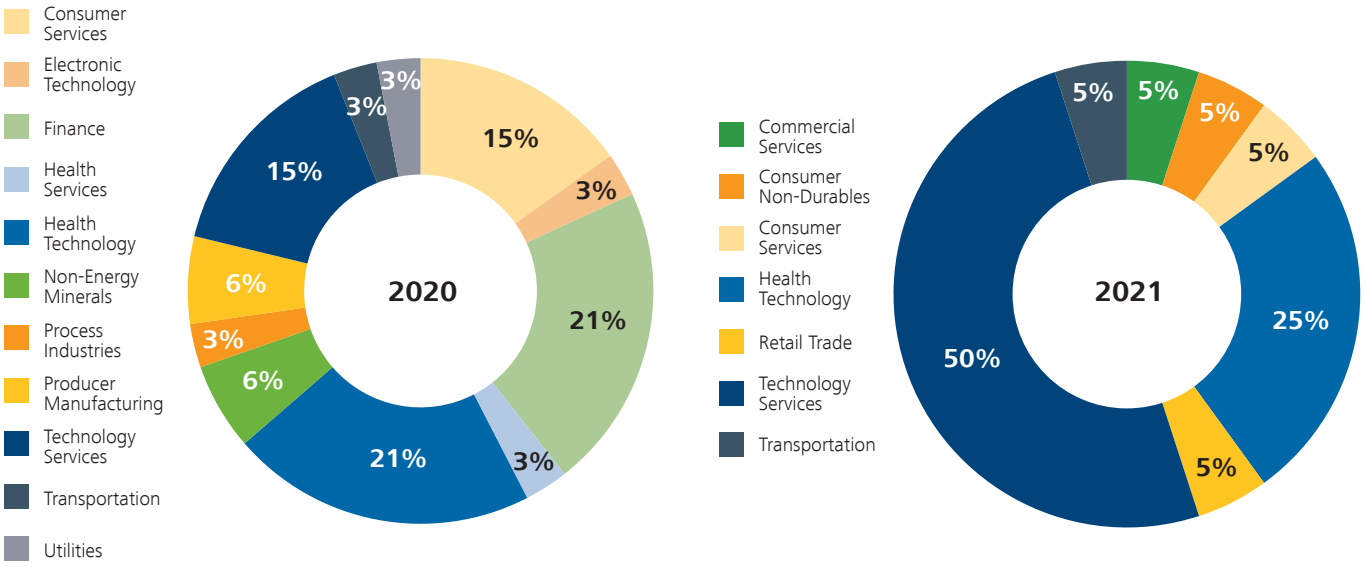
As part of our annual review process, we identify potential development areas for securities class action filings and review any new trends on previously identified areas.[5] Below, we summarize some of these areas for the last three years.

COVID-19

The first federal securities class action suit with claims related to COVID-19 included in the complaint was filed in March 2020. Since then, there have been a total of 52 additional suits. In 2021, there were 20 securities class action cases filed with a COVID-19-related claim, a decrease from the 33 suits filed in 2020. While the Ninth Circuit was the jurisdiction with the highest percentage of COVID-19-related filings in 2020, the Second Circuit was the most common venue in 2021.

Of the 2021 cases filed with a COVID-19-related claim in the complaint, 50% were against defendants in the technology services economic sector. Among the 2020 cases filed with a COVID-19 claim, only 15% were against defendants within this sector. See Figure 6.

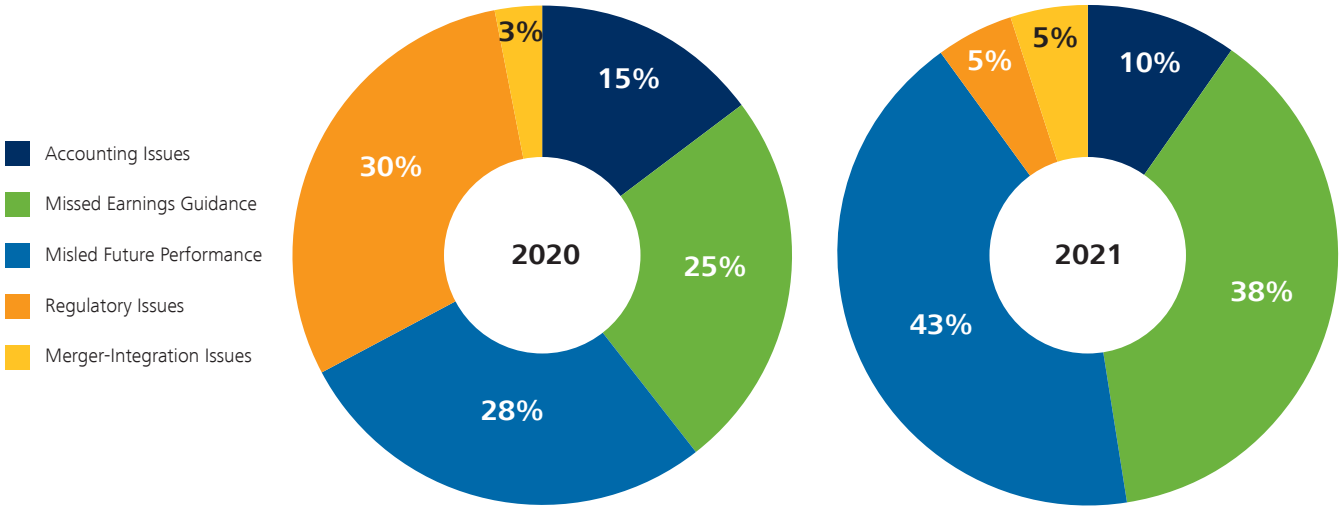
Figure 6. **Percentage of COVID-19-Related Federal Filings by Sector and Year**
March 2020–December 2021



Note: Due to rounding, percentages may not add to 100%.

In 2020, a violation related to regulatory issues was the most common allegation among the COVID-19-related cases. However, in 2021, only one case with a COVID-19 claim included an allegation of regulatory issues. In contrast, the most common allegation included in the COVID-19-related suits filed in 2021 related to future performance. See Figure 7.

Figure 7. **Percentage of COVID-19-Related Federal Filings by Allegation and Year**
March 2020–December 2021



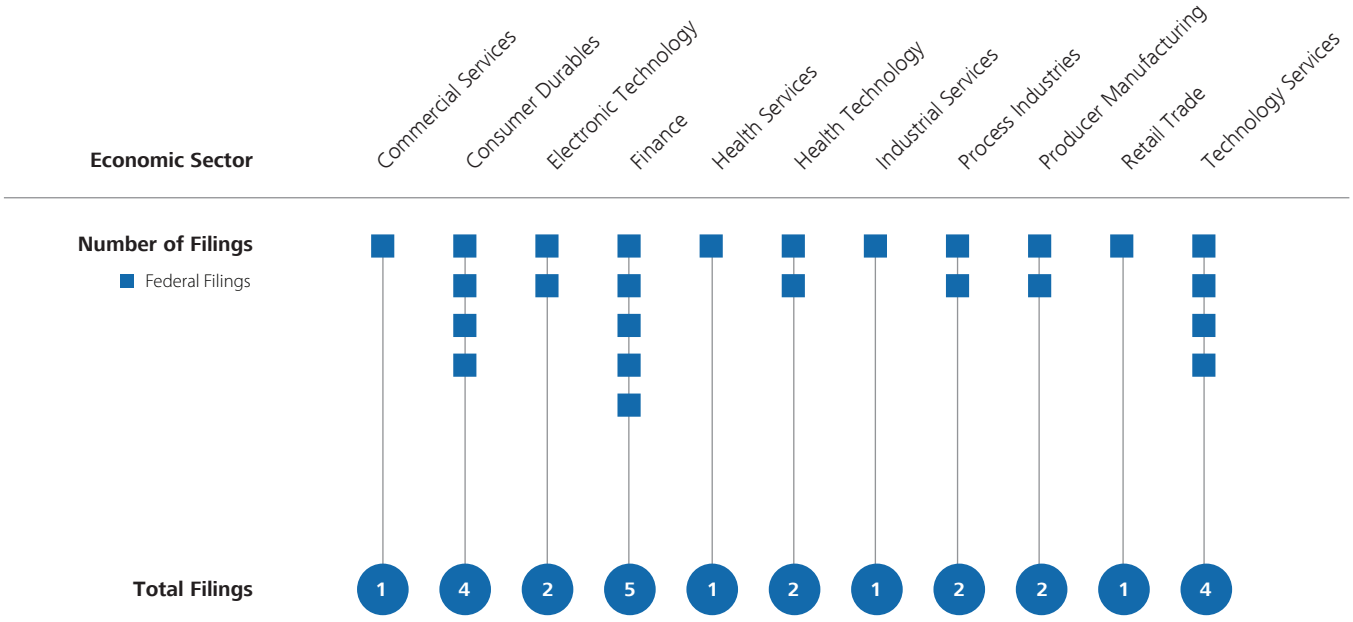
Note: Due to rounding, percentages may not add to 100%.

SPAC

In 2021, numerous federal cases were filed related to special purpose acquisition companies (SPACs). Between January 2021 and December 2021, a total of 24 cases related to SPACs were filed, a substantial increase from the one case filed in 2020.

These suits were filed against defendants in a number of sectors, with defendants in the consumer durables, technology services, and finance sectors being the most frequently targeted in 2020–2021. See Figure 8.

Figure 8. **Number of SPAC-Related Federal Filings by Sector**
December 2020–December 2021



Of the 25 SPAC cases filed in 2020 and 2021, all but one included an allegation related to merger-integration issues. Claims related to misleading earnings guidance were found in 11 of the 25 SPAC cases. In total, these suits included 49 allegations, or an average of approximately two allegations per suit. See Figure 9.

Figure 9. **Number of SPAC-Related Federal Filings by Allegation**
December 2020–December 2021

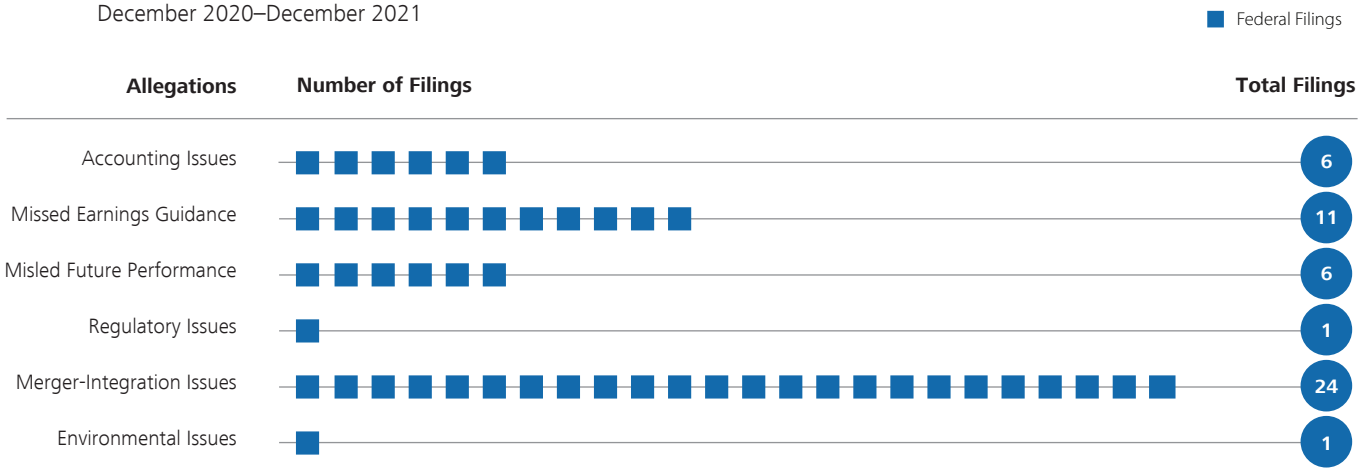
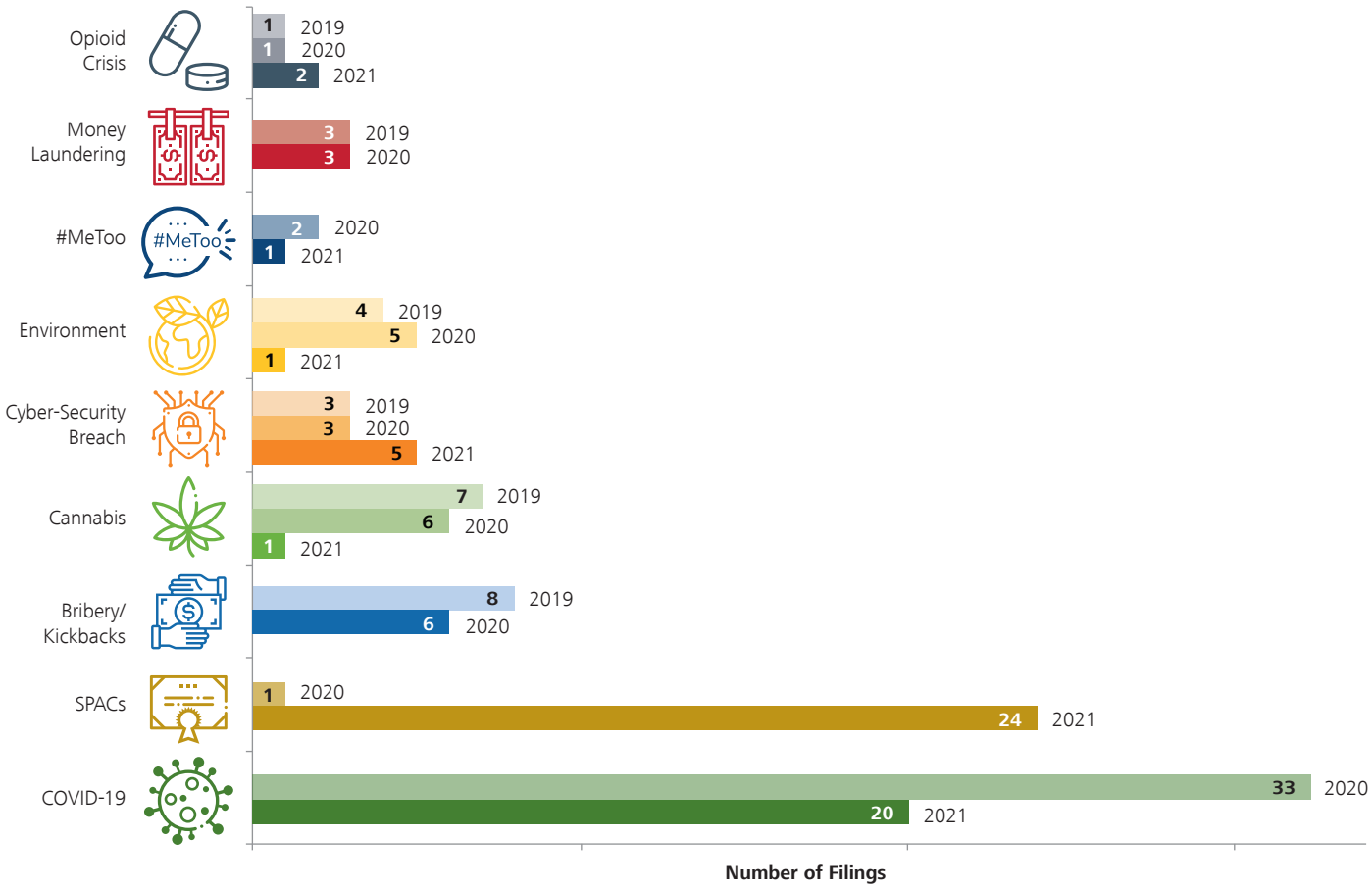


Figure 10. **Event-Driven and Other Special Cases by Filing Year**
January 2019–December 2021



Bribery/Kickbacks

In 2019 and 2020, there were eight and six bribery/kickback-related securities class action cases filed, respectively. However, in 2021, there were no such cases filed. See Figure 10.

Cannabis

Over the 2019–2020 period, 13 cases were filed against defendants in the cannabis industry. In 2021, only one such securities class action case was filed. See Figure 10.

Cybersecurity Breach

Unlike some other development or special interest areas, securities class action filings related to a cybersecurity breach continued to be filed in 2021. In both 2019 and 2020 individually, three cases were filed related to a cybersecurity breach. While still only a handful of cases, there was an increase in 2021 with five such cases filed. See Figure 10.

Environment

In 2021, there was one environment-related case filed. This is a decrease from the five cases filed in 2020 and the four cases filed in 2019. See Figure 10.

Money Laundering

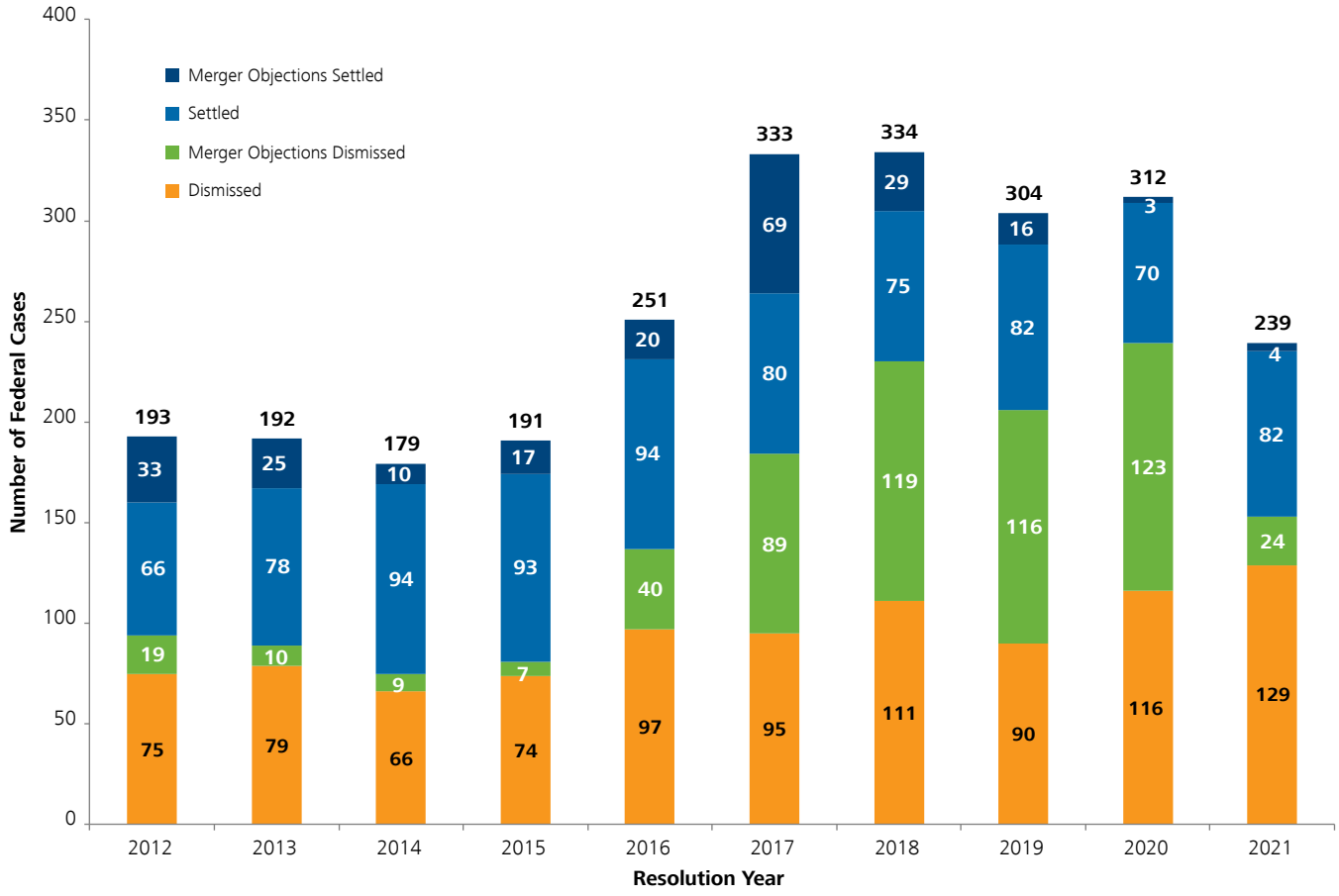
In total, six cases with claims of money laundering were filed in the 2019–2020 period, with three cases filed each year. No cases with money laundering claims were filed in 2021. See Figure 10.

Trends in Resolutions

Resolutions consist of both dismissed and settled cases.[6] In any one year, the aggregate number of resolutions may be affected by changes in either or both categories. For our analysis, we review changes within these categories as well as the trends for merger objections and non-merger-objection cases separately. In addition, we review the current status of securities class action suits filed in the last 10 years.

In 2021, 239 cases were resolved, the lowest recorded level of resolutions since 2015. Of those, 153 were dismissed and 86 resolved through a settlement. This is a decrease in both aggregate resolutions and dismissals compared to 2020. However, compared to the pre-2017 resolutions, the 239 cases resolved is well within the historical range of annual resolutions. See Figure 11.

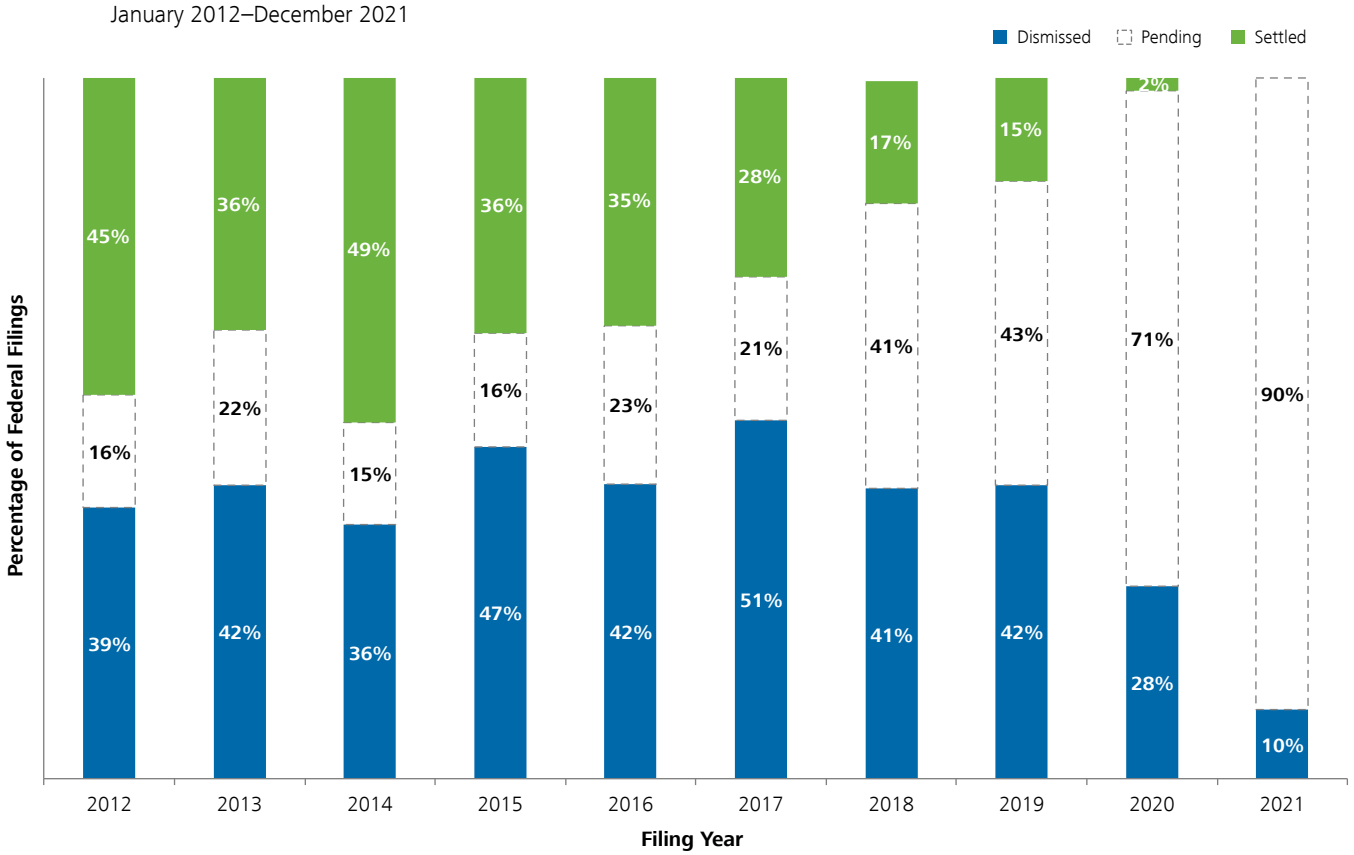
Figure 11. **Number of Resolved Cases: Dismissed or Settled**
January 2012–December 2021



A review of the resolution pattern by type of case reveals differing trends. Although not a substantial increase, the number of non-merger-objection resolutions in 2021 was the highest recorded in the last 10 years. While there was a modest increase in both the number of non-merger-objection suits dismissed and settled relative to 2020, there was a decrease in dismissed merger-objection cases. In fact, the number of merger-objection suits dismissed in 2021 was more than 80% fewer than the number of similar suits dismissed in 2020. This decline in the number of dismissed merger-objection suits was more than sufficient to offset the increase in Rule 10b-5, Section 11, and/or 12 case (standard case) resolutions, resulting in a lower aggregate number of cases resolved in 2021.

For each filing year since 2015, more cases have been resolved in favor of the defendant than have been settled. This is consistent with historical trends, which have indicated that settlements typically occur later in the litigation process. Reviewing cases filed in 2020, as of December 2020, 6% were dismissed and 94% remained pending.[7] For the same group of cases, as of December 2021, 28% were dismissed and only 2% were settled. Of the cases filed in 2021, a higher proportion of cases were dismissed in the year of filing than the cases filed in 2020, with 10% dismissed as of year-end 2021. See Figure 12.

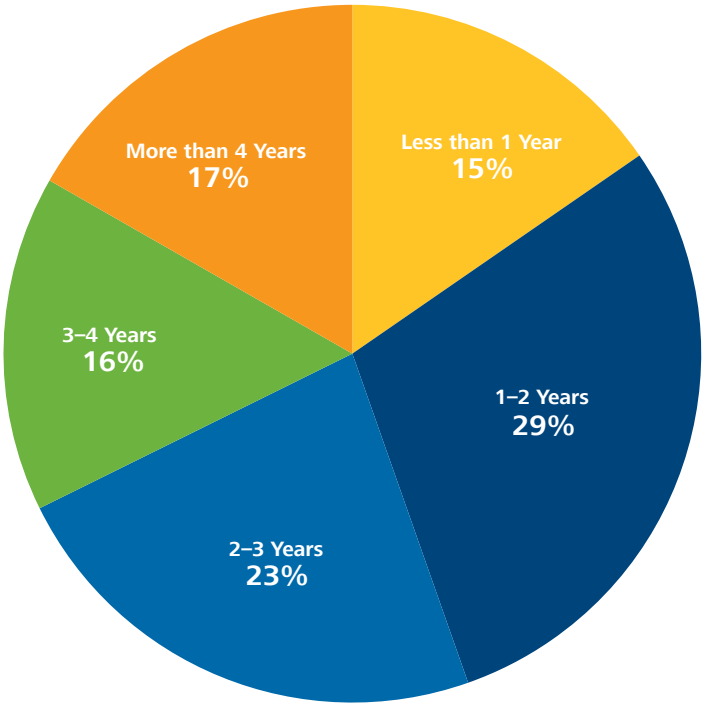
Figure 12. **Status of Cases as Percentage of Federal Filings by Filing Year**
Excludes Merger Objections and Verdicts
January 2012–December 2021



Note: Dismissals may include dismissals without prejudice and dismissals under appeal.

While 83% of cases resolve in four years or less, over half of cases are resolved between one and three years after filing.[8] See Figure 13.

Figure 13. **Time from First Complaint Filing to Resolution**
Excludes Merger Objections and Laddering Cases
Cases Filed January 2003–December 2017 and Resolved January 2003–December 2021



"The number of merger-objection suits dismissed in 2021 was more than 80% fewer than the number of similar suits dismissed in 2020. This decline in the number of dismissed merger-objection suits was more than sufficient to offset the increase in standard case resolutions, resulting in a lower aggregate number of cases resolved in 2021."

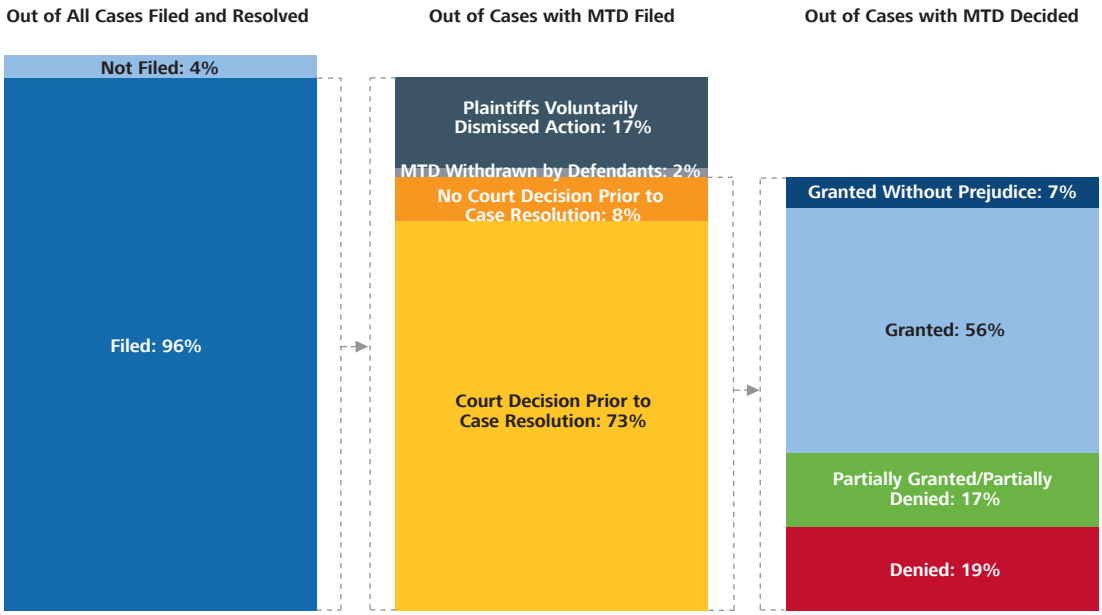
Analysis of Motions

In addition to tracking filing and resolution information for federal securities class actions, NERA also tracks decisions on motions to dismiss and motions for class certification, and the status of any motion as of the resolution of each case.[9]

Motion to Dismiss

Of the securities class action cases filed and resolved between 1 January 2012 and 31 December 2021, a motion to dismiss was filed in 96%. Among those, a decision was reached in 73% of cases. Of the cases with a decision on a motion to dismiss, approximately 56% were granted while only 19% were denied. Lastly, of the 96% of cases with a motion to dismiss filed, plaintiffs voluntarily dismissed the action in 17%, while the motion to dismiss was withdrawn by defendants only in an additional 2%. See Figure 14.

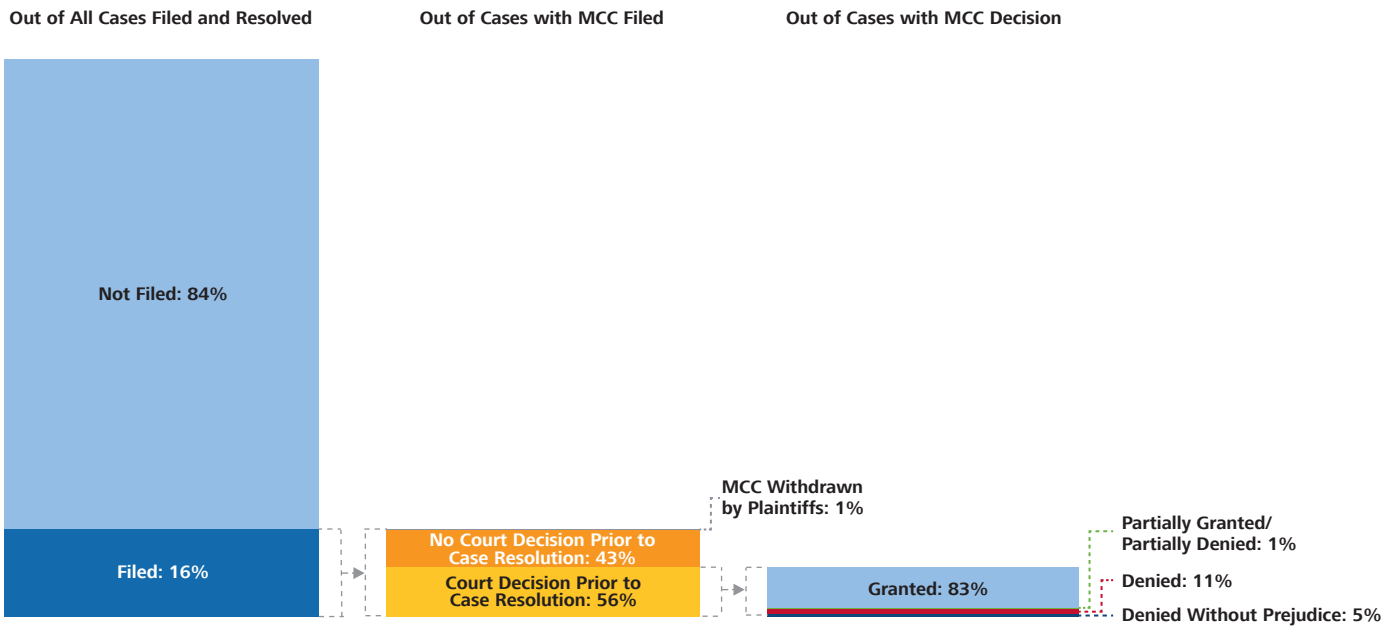
Figure 14. **Filing and Resolutions of Motions to Dismiss**
Cases Filed and Resolved January 2012–December 2021



Motion for Class Certification

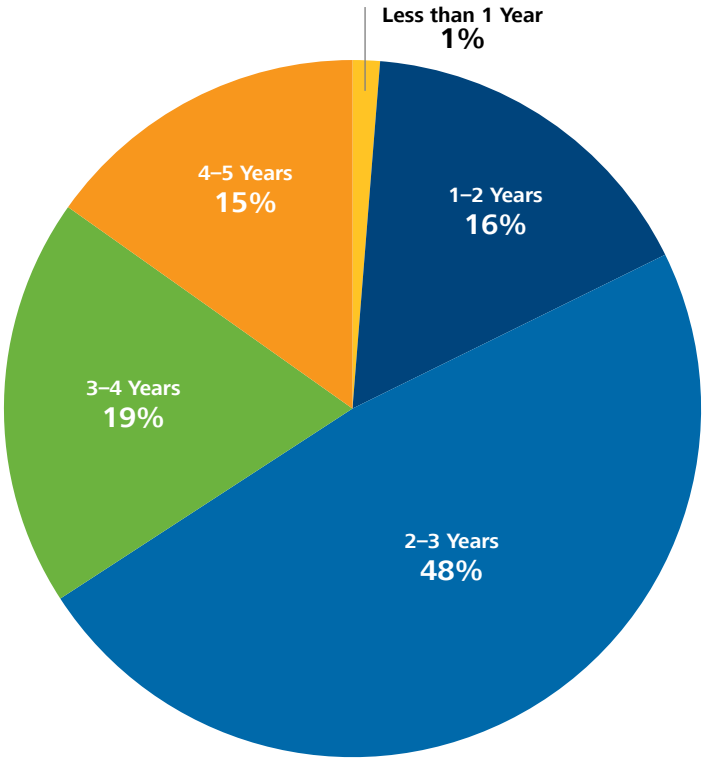
A motion for class certification was filed in less than 20% of the securities class action suits filed and resolved between 1 January 2012 and 31 December 2021. This is partly due to the fact that a substantial number of cases are either dismissed or settled before the class-certification stage of the case is reached. A decision was reached in 56% of the cases where a motion for class certification was filed, with the motion being withdrawn by plaintiffs in an additional 1% of the cases. Among the cases with a decision, the motion for class certification was granted in 83% and partially granted and partially denied in an additional 1% of cases. See Figure 15.

Figure 15. **Filing and Resolutions of Motions for Class Certification**
Cases Filed and Resolved January 2012–December 2021



Approximately half of decisions on motions for class certification occur between two and three years after the filing of the first complaint. See Figure 16.

Figure 16. **Time from First Complaint Filing to Class Certification Decision**
Cases Filed and Resolved January 2012–December 2021

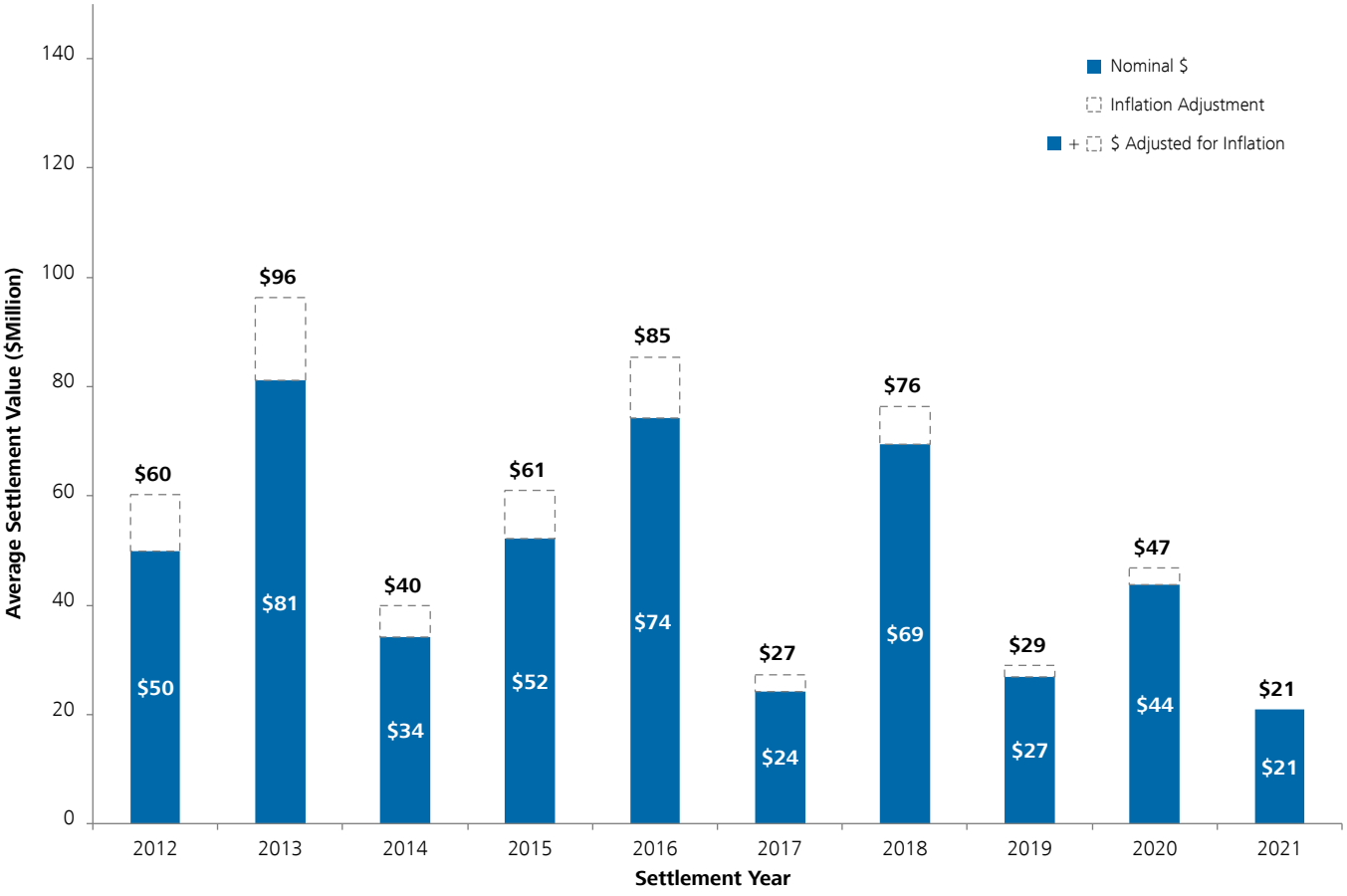


"A motion for class certification was filed in less than 20% of the securities class action suits filed and resolved between 1 January 2012 and 31 December 2021."

Trends in Settlement Values

In 2021, aggregate settlements amounted to $1.8 billion. This amount is $400 million lower than the inflation-adjusted $2.2 billion aggregate settlement amount in 2019, and considerably lower than the inflation-adjusted amounts of $3.1 billion and $5.2 billion in 2020 and 2018, respectively. Trends in settlement values can be evaluated using a variety of metrics, including distributions of settlement values, average settlement values, and median settlement values. While annual average settlement values can be a helpful statistic, these values may be impacted by one or, in some cases, a few very high settlement amounts. Unlike averages, the median settlement value is unaffected by these very high "outlier" settlement amounts and gives insight into the most frequent settlement amounts. To understand what more "typical" cases look like, we also analyze the average and median settlement values for cases with a settlement amount under $1 billion, thus excluding these "outlier" settlement amounts. For the analysis of settlement values, our data is limited to non-merger-objection cases with positive settlement values.[10]

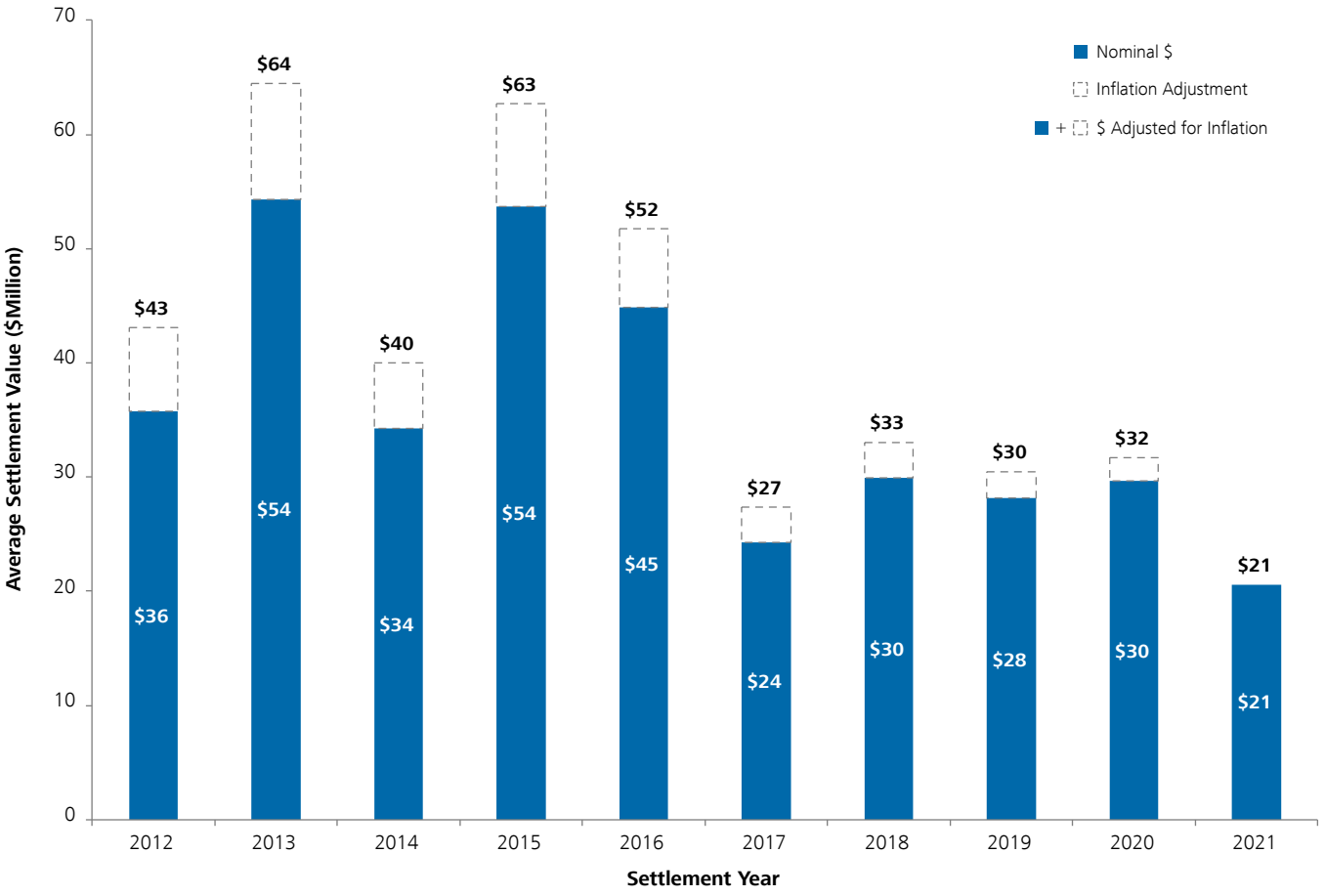
Figure 17. **Average Settlement Value**
Excludes Merger Objections and Settlements for $0 to the Class
January 2012–December 2021



The average settlement value in 2021 was $21 million, which is more than 50% lower than the 2020 inflation-adjusted average of $47 million and marks the lowest recorded average in the last 10 years. The inflation-adjusted average settlement value has ranged from a low of $21 million in 2021 to a high of inflation-adjusted $96 million in 2013, partly due to the presence or absence of one or two "outlier" or "mega" settlements, which for this purpose are single case settlements of $1 billion or higher. See Figure 17. Unlike in 2020 when there was one "mega" settlement, there were no cases resolved with a settlement amount above $1 billion in 2021. In fact, the highest recorded settlement amount is 2021 was $155 million.

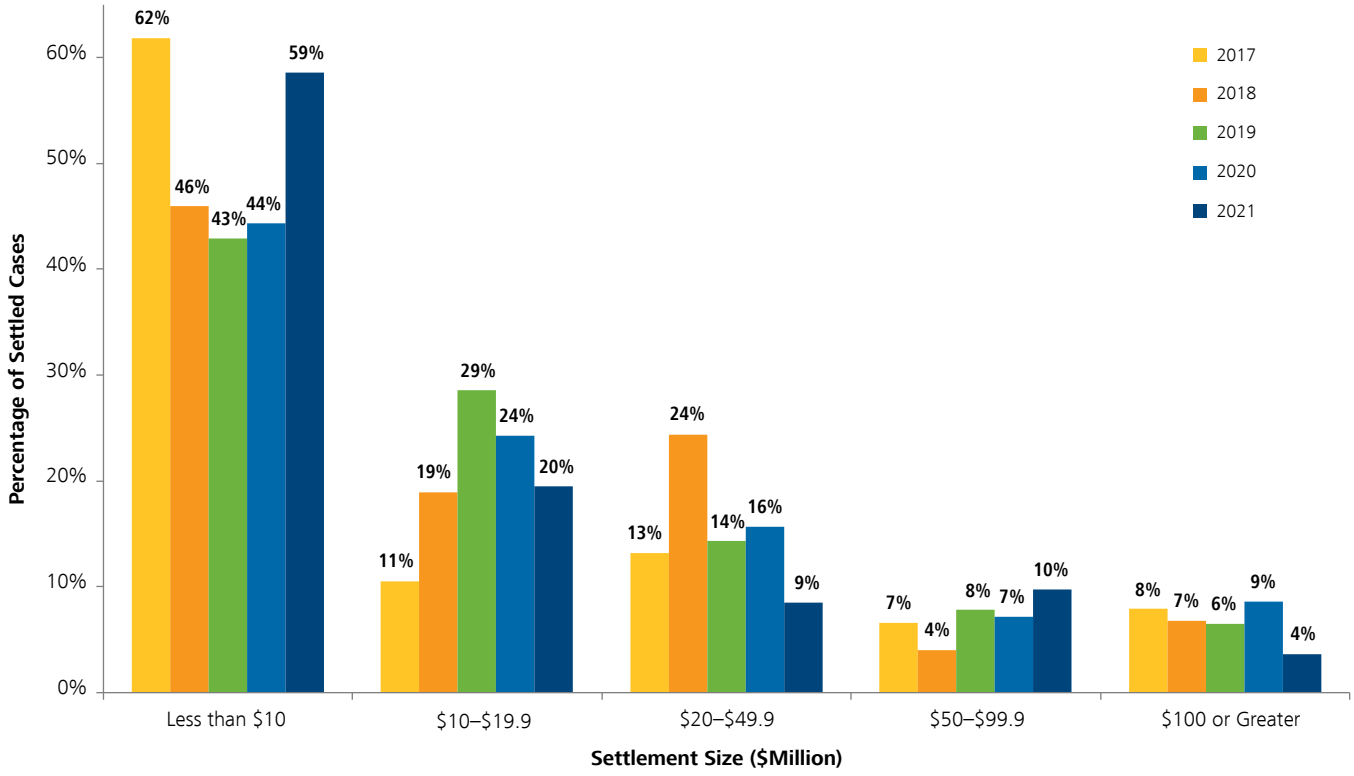
Once settlements greater than $1 billion are excluded, the inflation-adjusted annual average settlement values trend is more stable, ranging from $21 million to $33 million in the last five years. In this group of settlements, the average settlement value for 2021 was $21 million, still the lowest annual average within the most recent 10 years. See Figure 18.

Figure 18. **Average Settlement Value**
Excludes Settlements over $1 Billion, Merger Objections, and Settlements for $0 to the Class
January 2012–December 2021



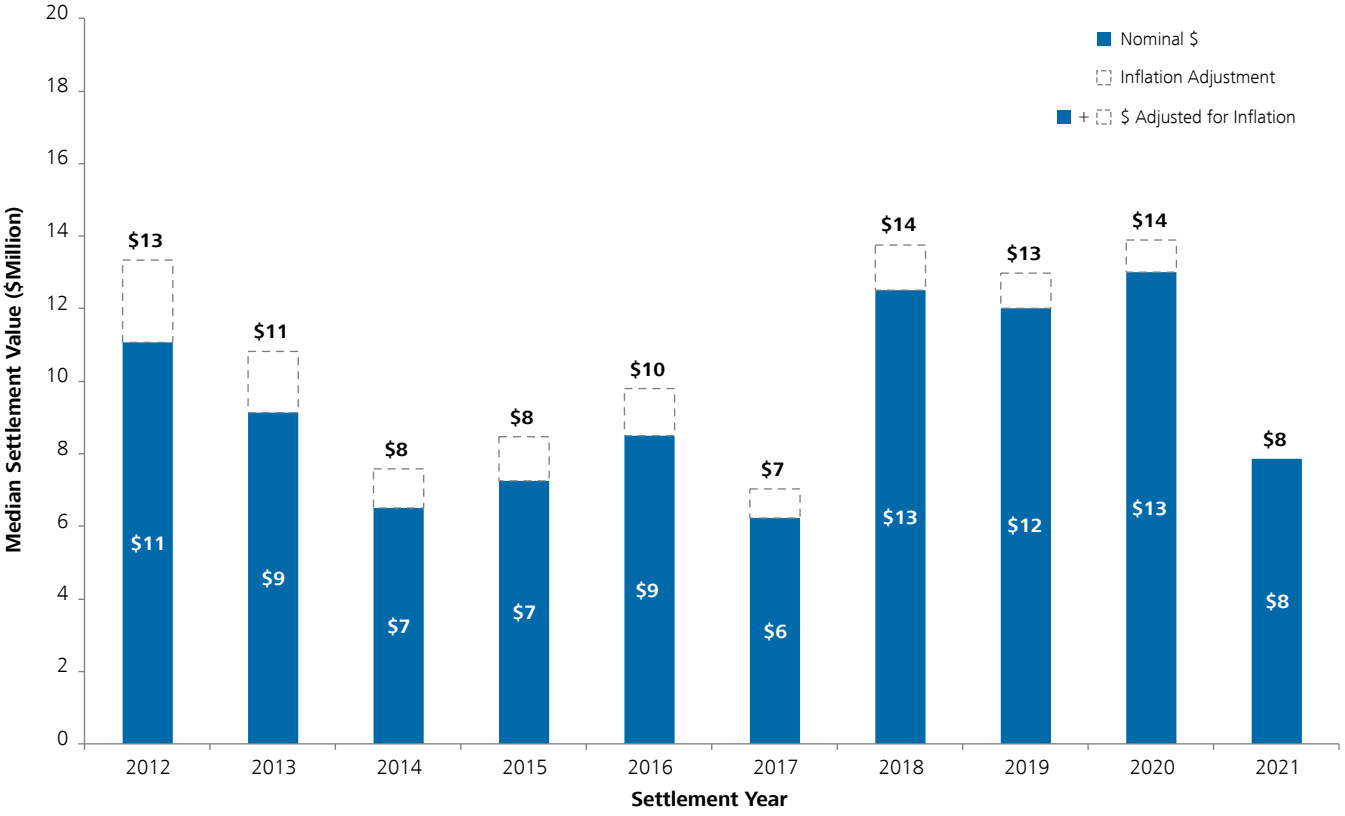
While there was a shift upward in the annual distribution of nominal settlement values between 2017 and 2020, this trend did not persist in 2021. Instead, in 2021, nearly 60% of cases resolved for settlement amounts less than $10 million. This increase in the proportion of cases settling for lower values in 2021 was accompanied by a decrease in the proportion of cases resolving for $100 million or greater, with fewer than 5% of settlements falling in this range. See Figure 19.

Figure 19. **Distribution of Settlement Values**
Excludes Merger Objections and Settlements for $0 to the Class
January 2017–December 2021



The median annual settlement value for 2021 is approximately 40% lower than the inflation-adjusted median value observed in 2018, 2019, and 2020. For 2021, the median settlement value was $8 million, the lowest recorded median value since 2017. See Figure 20.

Figure 20. **Median Settlement Value**
Excludes Settlements over $1 Billion, Merger Objections, and Settlements for $0 to the Class
January 2012–December 2021



Top Settlements in 2021

Table 1 summarizes the 10 largest settlements reached in securities class action suits between 1 January 2021 and 31 December 2021. In total, the 10 largest settlements accounted for more than 50% of the aggregate settlement amount reached in 2021. Six of the top 10 settlements were reached with defendants in the health technology and services or technology services economic sectors. The Second Circuit was the most common circuit for these cases, accounting for four of the top 10 settlements.

Table 1. **Top 10 2021 Securities Class Action Settlements**

Ranking	Defendant	Filing Date	Settlement Date	Total Settlement Value ($Million)	Plaintiffs' Attorneys' Fees and Expenses Value ($Million)	Circuit	Economic Sector
1	Snap, Inc.	16 May 17	09 Mar 21	$154.7	$41.0	9th	Technology Services
2	DaVita Inc.	1 Feb 17	30 Mar 21	$135.0	$41.0	10th	Health Services
3	Allergan plc (f/k/a Actavis plc)	22 Dec 16	17 Nov 21	$130.0	$35.2	3rd	Health Technology
4	Tableau Software, Inc.	28 Jul 17	14 Sep 21	$95.0	$27.7	2nd	Technology Services
5	Cognizant Technology Solutions Corp.	5 Oct 16	20 Dec 21	$95.0	$19.5	3rd	Technology Services
6	The Southern Company	20 Jan 17	05 Feb 21	$87.5	$24.9	11th	Utilities
7	MetLife, Inc.	12 Jan 12	14 Apr 21	$84.0	$23.5	2nd	Finance
8	Towers Watson & Co.	21 Nov 17	21 May 21	$75.0	$13.7	4th	Commercial Services
9	CannTrust Holdings Inc.	10 Jul 19	02 Dec 21	$66.4	N/A*	2nd	Health Technology
10	Chemical and Mining Company of Chile Inc.	19 Mar 15	26 Apr 21	$62.5	$12.1	2nd	Process Industries
	Total			**$985.1**	**$238.5**		

*Fees only, expenses are not available yet.

Table 2 summarizes the 10 largest federal securities class action settlements since the passage of PSLRA. Since the Petrobras settlement in 2018, the settlements in this list have all been above $1 billion, ranging from $1.1 billion to $7.2 billion.

Table 2. **Top 10 Federal Securities Class Action Settlements** (As of 31 December 2021)

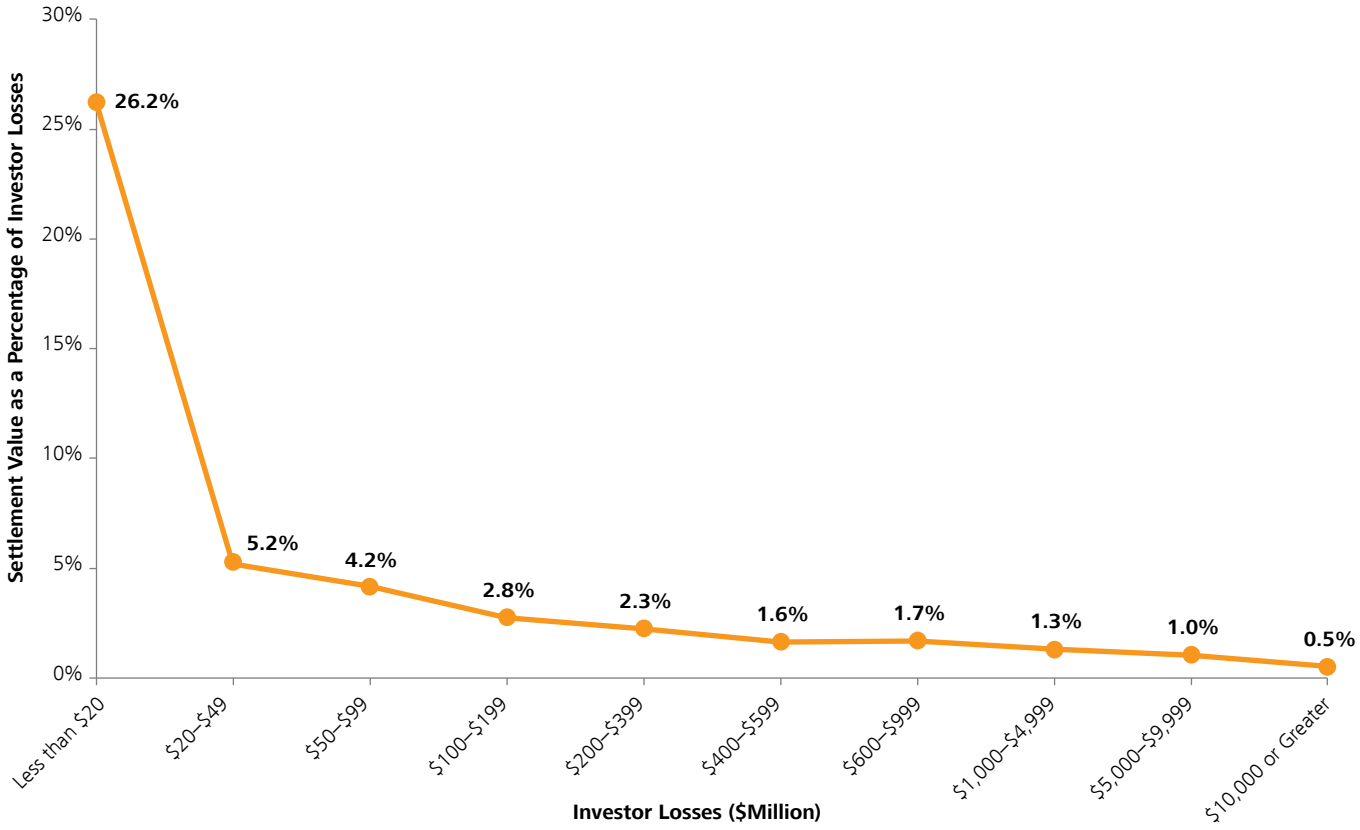
Ranking	Defendant	Filing Date	Settlement Year(s)	Total Settlement Value ($Million)	Codefendent Settlements		Plaintiffs' Attorneys' Fees and Expenses Value ($Million)	Circuit	Economic Sector
					Financial Institutions Value ($Million)	Accounting Firms Value ($Million)			
1	ENRON Corp.	22 Oct 01	2003–2010	$7,242	$6,903	$73	$798	5th	Industrial Services
2	WorldCom, Inc.	30 Apr 02	2004–2005	$6,196	$6,004	$103	$530	2nd	Communications
3	Cendant Corp.	16 Apr 98	2000	$3,692	$342	$467	$324	3rd	Finance
4	Tyco International, Ltd.	23 Aug 02	2007	$3,200	No codefendant	$225	$493	1st	Producer Manufacturing
5	Petroleo Brasileiro S.A.- Petrobras	8 Dec 14	2018	$3,000	$0	$50	$205	2nd	Energy Minerals
6	AOL Time Warner Inc.	18 Jul 02	2006	$2,650	No codefendant	$100	$151	2nd	Consumer Services
7	Bank of America Corp.	21 Jan 09	2013	$2,425	No codefendant	No codefendant	$177	2nd	Finance
8	Household International, Inc.	19 Aug 02	2006–2016	$1,577	Dismissed	Dismissed	$427	7th	Finance
9	Nortel Networks	2 Mar 01	2006	$1,143	No codefendant	$0	$94	2nd	Electronic Technology
10	Royal Ahold, NV	25 Feb 03	2006	$1,100	$0	$0	$170	2nd	Retail trade
	Total			**$32,224**	**$13,249**	**$1,017**	**$3,368**		

NERA-Defined Investor Losses

To estimate the potential aggregate loss to investors as a result of purchasing the defendant's stock during the alleged class period, NERA has developed its own proprietary variable, NERA-Defined Investor Losses, using publicly available data. The NERA-Defined Investor Losses measure is constructed assuming investors had invested in stocks during the class period whose performance was comparable to that of the S&P 500 Index. Over the years, NERA has reviewed and examined more than 2,000 settlements and found, of the variables analyzed, this proprietary variable is the most powerful predictor of settlement amount.[11]

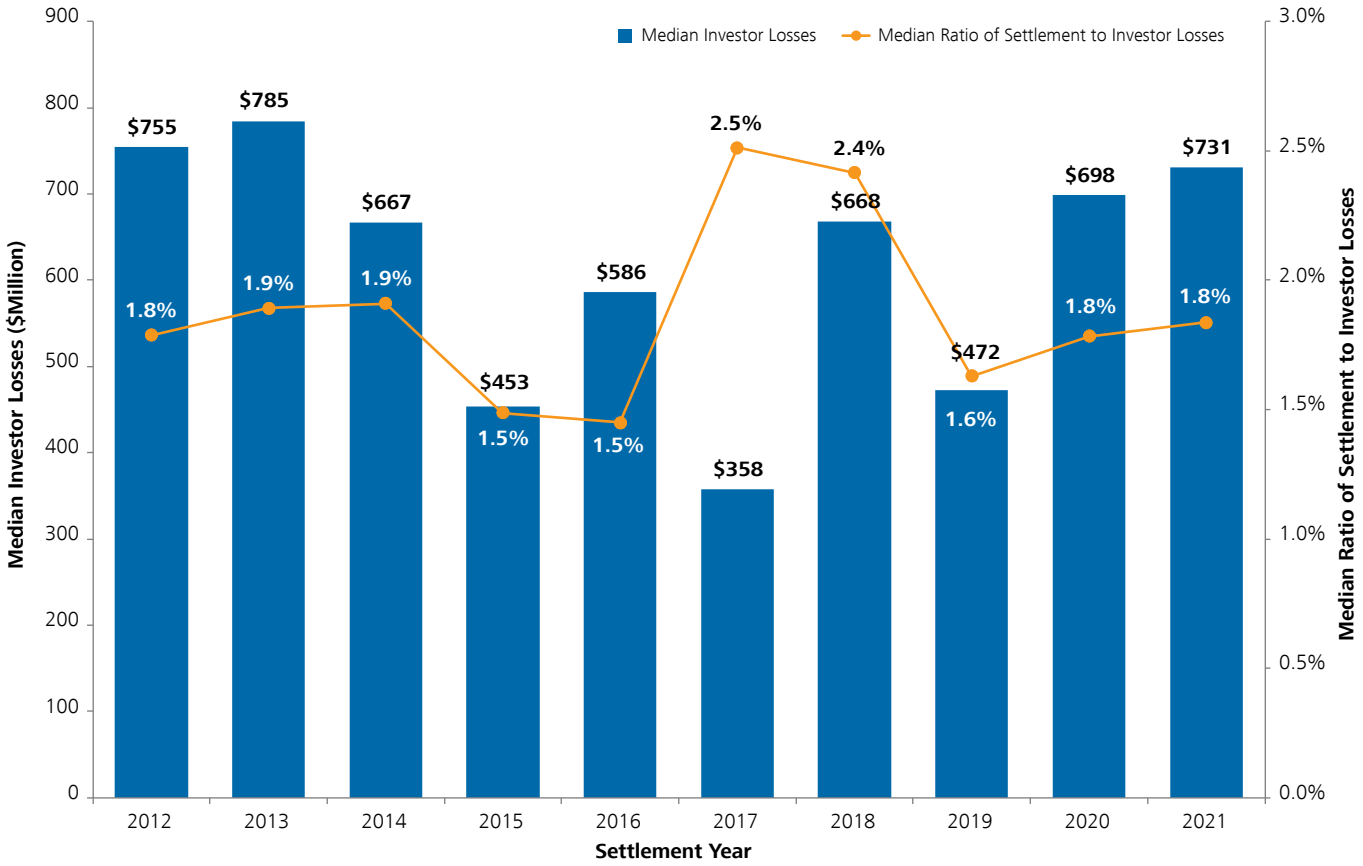
While settlement values are highly correlated with Investor Losses, the relationship between settlement amount and Investor Losses is not linear. More specifically, the ratio is higher for smaller cases than for cases with larger NERA-Defined Investor Losses. See Figure 21.

Figure 21. **Median Settlement Value as a Percentage of NERA-Defined Investor Losses**
By Investor Losses
Cases Filed and Settled December 2012–December 2021



The median Investor Losses for cases settled in 2021 was $731 million, the highest recorded value since 2013, but less than 5% higher than the 2020 value. Over the last 10 years, the annual median Investor Losses have ranged from a high of $785 million to a low of $358 million. Following an uptick in the median ratio of settlement amount to Investor Losses in 2017 to 2.5%, the ratio declined through 2019, with only modest increases in both 2020 and 2021. See Figure 22.

Figure 22. **Median NERA-Defined Investor Losses and Median Ratio of Settlement to Investor Losses by Settlement Year**
January 2012–December 2021

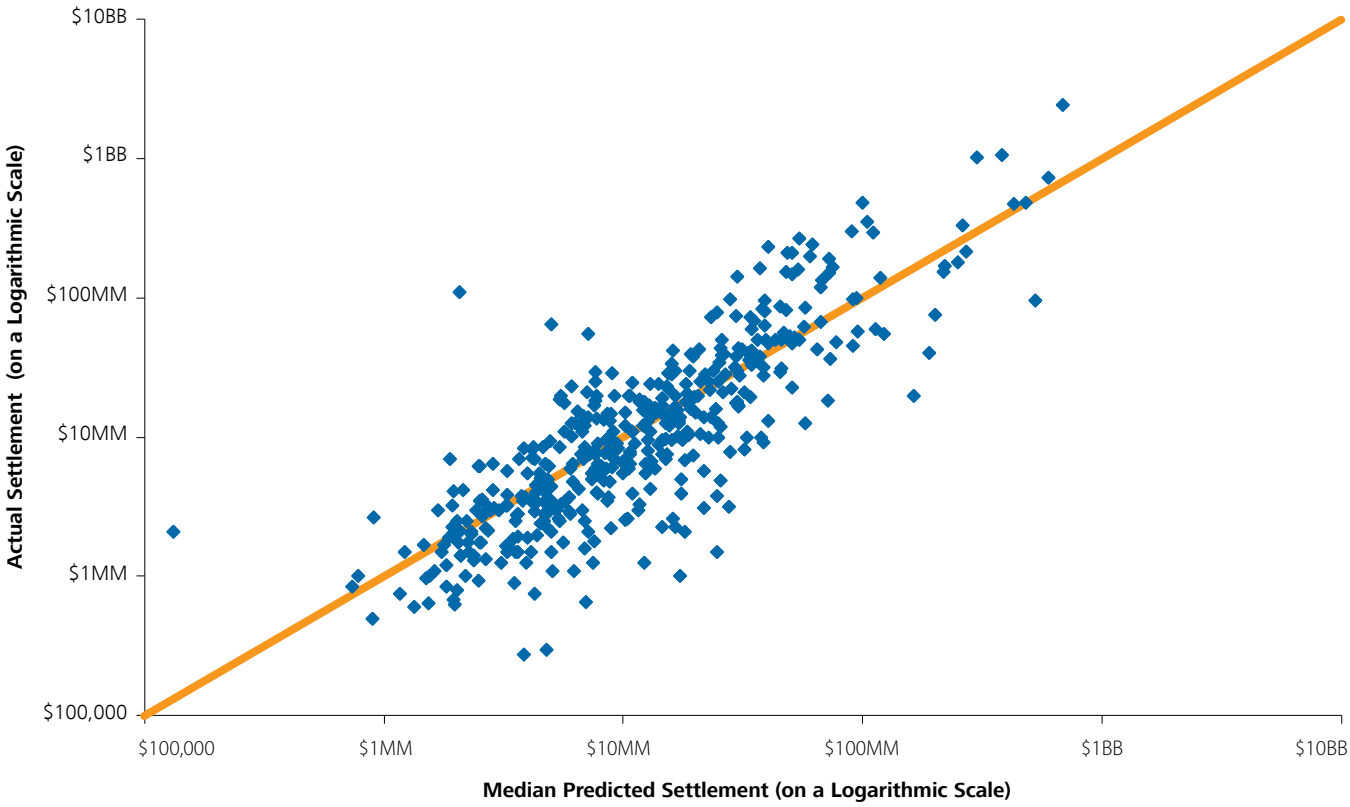


In analyzing drivers of settlement amounts, NERA has identified the following key factors:

- NERA-Defined Investor Losses, as defined above;
- The market capitalization of the issuer immediately after the end of the class period;
- The types of securities, in addition to common stock, alleged to have been affected by the fraud;
- Variables that serve as a proxy for the merit of plaintiffs' allegations (such as whether the company has already been sanctioned by a governmental or regulatory agency or paid a fine in connection with the allegations);
- The stage of litigation at the time of settlement; and
- Whether an institution or public pension fund is lead or named plaintiff.

Among cases settled between December 2012 and September 2021, these factors account for a substantial fraction of the variation observed in actual settlements. See Figure 23.

Figure 23. **Predicted vs. Actual Settlements**
Investor Losses Using S&P 500 Index
Cases Settled December 2012–September 2021

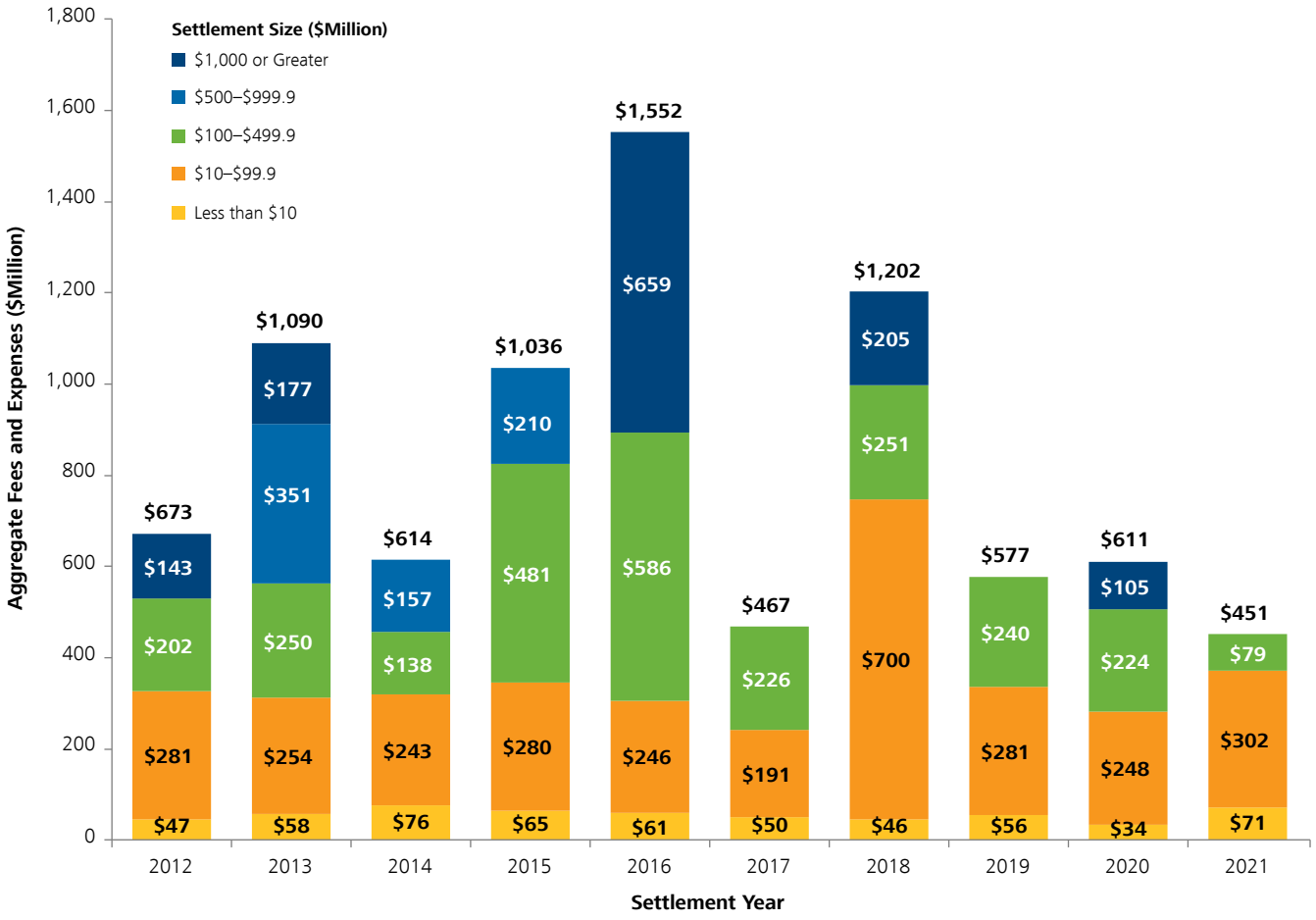


Trends in Plaintiffs' Attorneys' Fees and Expenses

Plaintiffs' attorneys' fees and expenses related to work on securities class action suits have varied substantially over time by settlement size. However, the median of plaintiffs' attorneys' fees and expenses as a percentage of settlement amount has been fairly consistent since 1996.

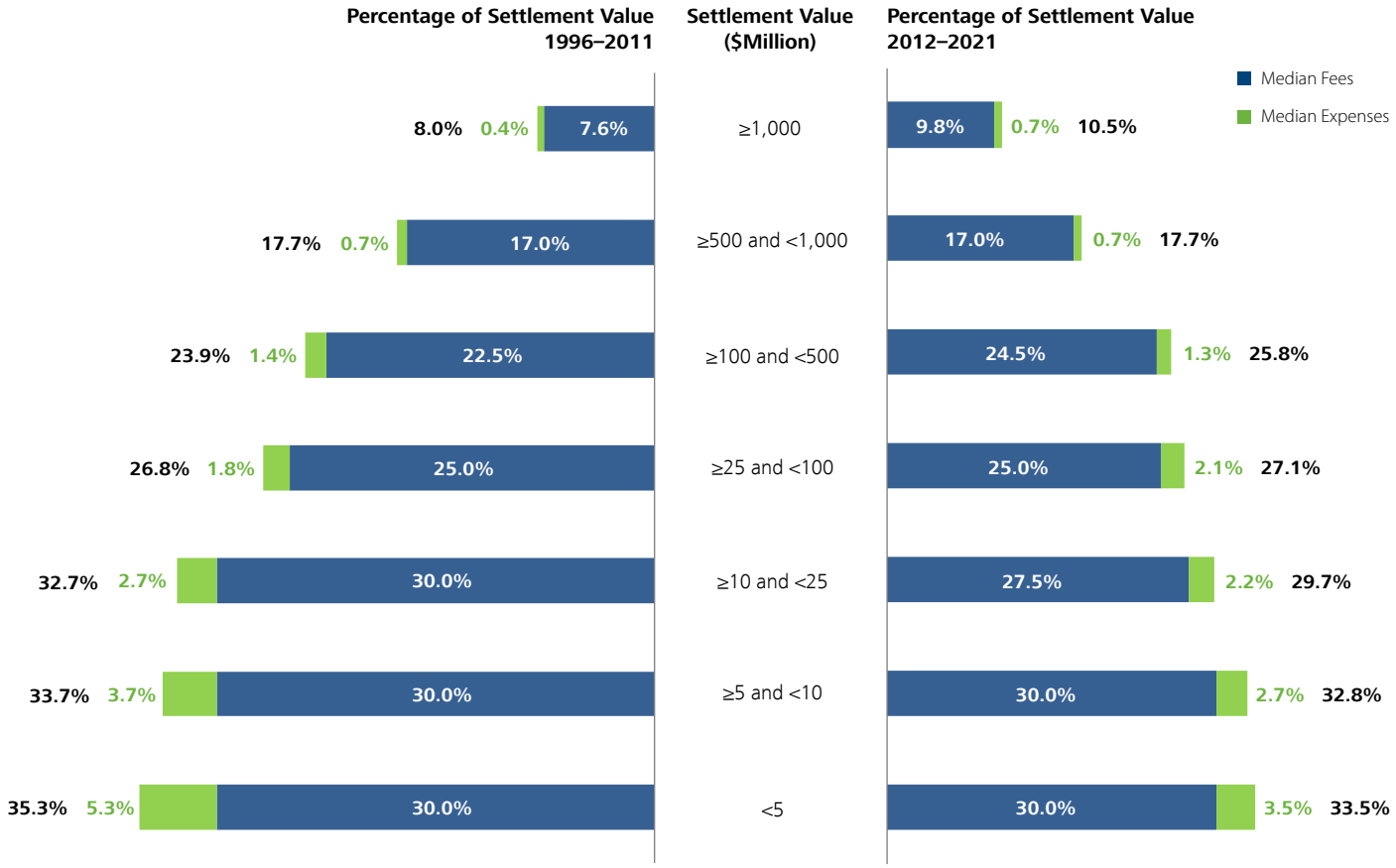
Between 2012 and 2020, the annual aggregate plaintiffs' attorneys' fees and expenses ranged from a low of $467 million in 2017 to a high of $1.6 billion in 2016. For 2021, the aggregate plaintiffs' attorneys' fees and expenses associated with settled cases was $451 million. Given the absence of any settlements above $500 million in 2021, similar to 2019, there were no plaintiffs' attorneys' fees and expenses associated with settlements of $500 million or higher. And while there was an increase in the aggregate fees and expenses for settlements under $100 million, there was an offsetting decrease in the aggregate fees and expenses for settlements between $100 million and $500 million. See Figure 24.

Figure 24. **Aggregate Plaintiffs' Attorneys' Fees and Expenses by Settlement Size**
January 2012–December 2021



As settlement size increases, fees and expenses represent a declining percentage of settlement value. More specifically, while the percentage is only 10.5% for cases that settled for over $1 billion in the last 10 years, for cases with settlement amounts under $5 million, fees and expenses represent 34% of the settlement. See Figure 25.

Figure 25. **Median of Plaintiffs' Attorneys' Fees and Expenses by Size of Settlement**
Excludes Merger Objections and Settlements for $0 to the Class



Conclusion

New securities class action cases filed declined to 205 in 2021, the lowest number of annual filings in the last 10 years but well within the historical range. This decline in total filings was driven primarily by the 85% decrease in merger-objection cases between 2020 and 2021. Due to the numerous filings related to SPACs, the percentage of cases alleging a violation related to merger integration issues increased to 17% while violations related to misled future performance, the most common allegation, were included in 40% of the 2021 suits filed. In 2021, there was a decline in total resolutions, resulting from a notable decrease in the number of merger-objection cases dismissed.

Of the 96% of cases with a motion to dismiss filed, a decision was reached in 73% of the cases prior to resolution of the case, with the motion to dismiss granted in approximately 56% of these cases. Among cases with a motion for class certification filed, a decision was reached in 56% prior to the case resolution, with the motion for class certification granted in 83% of the cases with a decision.

Aggregate settlements in 2021 amounted to $1.8 billion, the lowest total in the 2018–2021 period. No cases resolved with a settlement amount of $1 billion or higher in the last year. The average settlement value for all non-merger-objection cases with positive settlement values, and cases of less than $1 billion, decreased in 2021 to $21 million. The median settlement value showed a similar trend, declining by approximately 40% to $8 million.

Notes

1 This edition of NERA's report on "Recent Trends in Securities Class Action Litigation" expands on previous work by our colleagues Lucy P. Allen, Dr. Vinita Juneja, Dr. Denise Neumann Martin, Dr. Jordan Milev, Robert Patton, Dr. Stephanie Plancich, and others. The authors thank Dr. David Tabak and Benjamin Seggerson for helpful comments on this edition. We thank researchers in NERA's Securities and Finance Practice for their valuable assistance. These individuals receive credit for improving this report; any errors and omissions are those of the authors. NERA's proprietary securities class action database and all analyses reflected in this report are limited to federal case filings and resolutions.

2 Data for this report were collected from multiple sources, including Institutional Shareholder Services, complaints, case dockets, Dow Jones Factiva, Bloomberg Finance, FactSet Research Systems, Nasdaq, Intercontinental Exchange, US Securities and Exchange Commission (SEC) filings, and public press reports.

3 NERA tracks class actions involving securities that have been filed in federal courts. Most of these cases allege violations of federal securities laws; others allege violations of common law, including breach of fiduciary duty, as with some merger-objection cases; still others are filed in federal court under foreign or state law. If multiple actions are filed against the same defendant, are related to the same allegations, and are in the same circuit, we treat them as a single filing. However, the first two actions filed in different circuits are treated as separate filings. If cases filed in different circuits are consolidated, we revise our count to reflect the consolidation. Therefore, case counts for a particular year may change over time. Different assumptions for consolidating filings would probably lead to counts that are directionally similar but may, in certain circumstances, lead observers to draw a different conclusion about short-term trends in filings.

4 Most securities class action complaints include multiple allegations. For this analysis, all allegations from the complaint are included and, as such, the total number of allegations exceeds the total number of filings.

5 It is important to note that, due to the small number of cases in some of these categories, the findings summarized here may be driven by one or two cases.

6 Here the word "dismissed" is used as shorthand for all cases resolved without settlement; it includes cases in which a motion to dismiss was granted (and not appealed or appealed unsuccessfully), voluntary dismissals, cases terminated by a successful motion for summary judgment, or an unsuccessful motion for class certification.

7 See Janeen McIntosh and Svetlana Starykh, "Recent Trends in Securities Class Action Litigation: 2020 Full-Year Review," NERA Economic Consulting, p. 13, Figure 11, available at https://www.nera.com/publications/archive/2021/recent-trends-in-securities-class-action-litigation--2020-full-y.html.

8 Analyses in this section exclude IPO laddering cases and merger-objection cases.

9 NERA's analysis of motions only includes securities class action suits involving common stock, with or without other securities, and an allegation of Rule 10b-5 violation alone or accompanied by Section 11, and/or Section 12 violation.

10 For our analysis, NERA includes settlements that have had the first hearing of approval of case settlement by the court. This means we do not include partial settlements or tentative settlements that have been announced by plaintiffs and/or defendants. When evaluating trends in average and median settlement values, we limit our data to non-merger-objection cases with settlements of more than $0 to the class.

11 NERA-Defined Investor Losses is only calculable for cases involving allegations of damages to common stock over a defined class period. As a result, we have not calculated this metric for cases such as merger objections.

About NERA

NERA Economic Consulting (**www.nera.com**) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For more than six decades, we have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. We bring academic rigor, objectivity, and real-world industry experience to issues arising from competition, regulation, public policy, strategy, finance, and litigation.

NERA's clients value our ability to apply and communicate state-of-the-art approaches clearly and convincingly, our commitment to deliver unbiased findings, and our reputation for quality and independence. Our clients rely on the integrity and skills of our unparalleled team of economists and other experts backed by the resources and reliability of one of the world's largest economic consultancies. Continuing our legacy as the first international economic consultancy, NERA serves clients from major cities across North America, Europe, and Asia Pacific.

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Analyses in this report are based on 2,013 securities class actions filed after passage of the Private Securities Litigation Reform Act of 1995 (Reform Act) and settled from 1996 through year-end 2021. See page 16 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 a securities class action that is publicly announced to potential class members by means of a settlement notice.

2021 Highlights

While the number of settlements increased in 2021 to a 10-year high, several key metrics declined below recent levels. The median total settlement amount decreased to $8.3 million. And, reversing a trend observed in recent years, median "simplified tiered damages" were 42% below the 2020 median value.

- There were 87 settlements, totaling $1.8 billion, in 2021. (page 3)
- The median settlement of $8.3 million fell 22% from 2020 (adjusted for inflation). (page 4)
- Almost 60% of cases (51) settled for less than $10 million, and of these, 14 cases settled for less than $2 million. (page 4)
- There were three mega settlements (equal to or greater than $100 million), ranging from $130 million to $187.5 million. (page 3)
- Median "simplified tiered damages" (among cases with Rule 10b-5 claims) was the lowest since 2017 and the second lowest in the last decade. (page 5)
- In 2021, the number of settlements in cases with only Section 11 and/or Section 12(a)(2) claims ('33 Act claims) was nearly double the annual average from 2017 to 2020. (page 7)
- The proportion of settled cases alleging Generally Accepted Accounting Principles (GAAP) violations in Rule 10b-5 cases was 32%, a record low among all post–Reform Act years. (page 9)
- The rate of settled cases involving a corresponding action by the U.S. Securities and Exchange Commission (SEC) was the lowest in the past decade. (page 11)
- The median time from filing to settlement hearing date was 2.6 years, compared to 3.0 years for 2012 to 2020. (page 13)

Figure 1: Settlement Statistics

(Dollars in millions)

	2016–2020	2019	2020	2021
Number of Settlements	395	75	77	87
Total Amount	$20,486.9	$2.227.5	$4,395.2	$1,787.7
Minimum	$0.3	$0.5	$0.3	$0.6
Median	$9.9	$11.7	$10.6	$8.3
Average	$51.9	$29.7	$57.1	$20.5
Maximum	$3,237.5	$413.0	$1,266.9	$187.5

Note: Settlement dollars are adjusted for inflation; 2021 dollar equivalent figures are presented.

Author Commentary

Findings

There was no slowdown in settlement activity in 2021, even with the backdrop of the COVID-19 pandemic, as the number of securities class action settlements increased to a 10-year high. Since the typical duration from case filing to settlement is approximately three years, the uptick in 2021 settlements is consistent with the unprecedented number of case filings in 2017–2019,[1] which is when the majority of these settled cases were filed.

The record number of cases settled in 2021, however, did not translate into higher total settlement dollars. Both total settlement dollars and median settlement amount declined to their lowest levels since 2017, reflecting an increase in the proportion of smaller settlements (i.e., less than $10 million) compared to prior years.

The decline in settlement sizes can largely be attributed to lower estimates of our proxy for economic losses borne by shareholders, or "simplified tiered damages." Moreover, median issuer defendant total assets were more than 45% smaller for cases settled in 2021 compared to those settled in 2020.

Weaker cases may have contributed to the reduced settlement values as well. For example, the proportion of settled cases alleging a GAAP violation or involving a related SEC action were at record-low levels. Both of these factors are typically associated with higher settlement amounts and are sometimes considered proxies for stronger cases.[2] In addition, the frequency of other factors that our research finds are associated with higher settlement amounts, such as the involvement of an institutional investor as lead plaintiff or the presence of a parallel derivative action, were among the lowest observed in the last decade.

The mix of cases that settled in 2021 had smaller estimates of potential shareholder losses and lacked many of the plus factors that often contribute to higher settlement outcomes.

Dr. Laarni T. Bulan
Principal, Cornerstone Research

Similarly, our research finds that the number of docket entries—a proxy for the time and effort expended by plaintiff counsel and/or case complexity—is positively associated with settlement amounts. The average number of docket entries for cases settled in 2021 was the lowest in the last five years.

Undeterred by the challenges of the pandemic, securities class action settlements occurred in larger numbers and were resolved more quickly than observed in prior years. The increase in the number of settlements also reflects the unusually high rate of case filings when many of these settled cases were first initiated.

Dr. Laura E. Simmons
Senior Advisor, Cornerstone Research

Looking Ahead

We expect heightened settlement activity to continue in upcoming years given the elevated number of case filings in 2018–2020 compared to earlier years,[3] assuming no increases in dismissal rates. The higher number of smaller settlements observed in 2021 could also continue due to the decline in the median disclosure dollar loss (another proxy for shareholder losses) among case filings during the same time frame (2018–2020).

Several recent trends in case allegations have been observed in case filings since 2017, such as allegations related to cybersecurity, cryptocurrency, cannabis, COVID-19, and special purpose acquisition companies (SPACs).[4] We continue to see a small number of these cases settling, but a large portion remains active. In addition, the spike in SPAC filings in 2021, as shown in Cornerstone Research's *Securities Class Action Filings—2021 Year in Review*, is likely to affect settlement trends in future years.

—Laarni T. Bulan and Laura E. Simmons

Total Settlement Dollars

As has been observed in prior years, the presence or absence of just a few very large settlements can have an outsized effect on total reported settlement dollars.

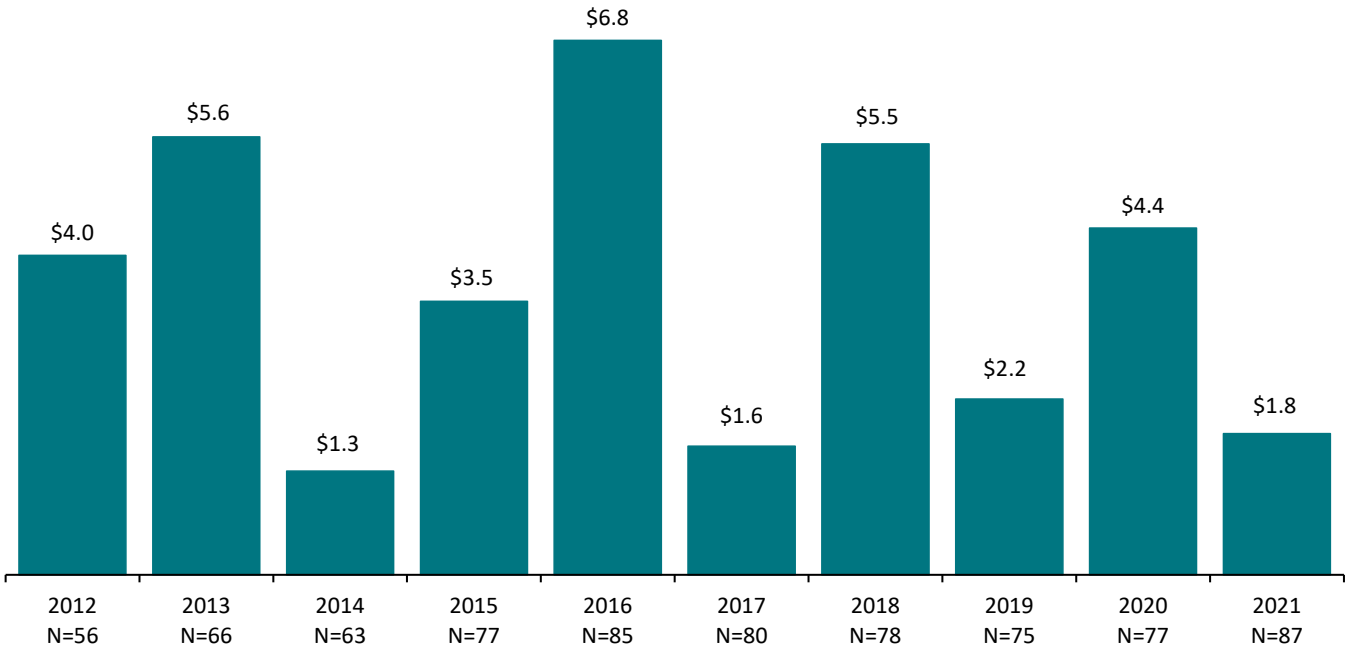
- In 2021, the absence of these very large settlements contributed to a nearly 60% decline in total settlement dollars from the prior year (adjusted for inflation).
- There were three mega settlements (equal to or greater than $100 million) in 2021, ranging from $130 million to $187.5 million. The maximum settlement value of $187.5 million in 2021 is the lowest maximum value in the last decade.

The number of settlements in 2021 reached a 10-year high.

- Only 25% of total settlement dollars in 2021 came from mega settlements, the lowest percentage in the last decade. *(See Appendix 4 for additional information on mega settlements.)*
- The number of settlements in 2021 (87 cases) represented a 19% increase from the prior nine-year average (73 cases).

Figure 2: Total Settlement Dollars
2012–2021

(Dollars in billions)



Note: Settlement dollars are adjusted for inflation; 2021 dollar equivalent figures are presented. "N" refers to the number of cases.

Settlement Size

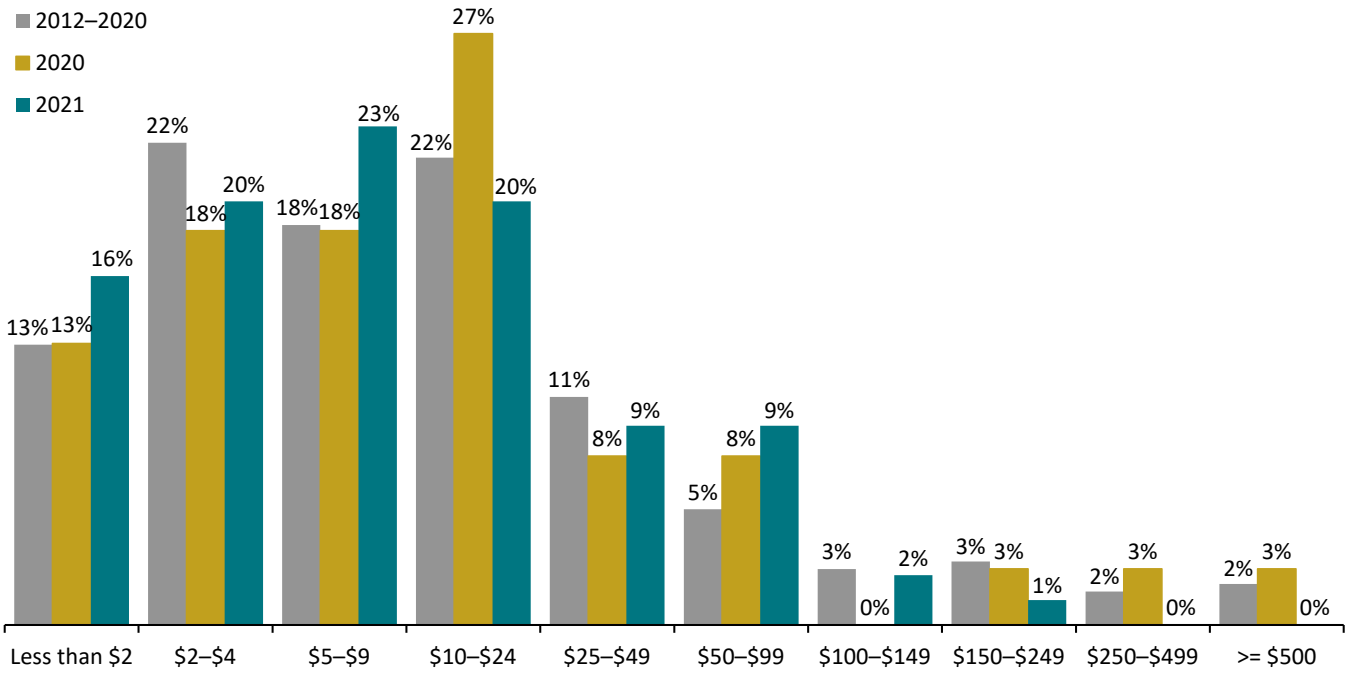
- The median settlement amount in 2021 was $8.3 million, a 22% decline from 2020 (adjusted for inflation), and a 10% decline from the 2012–2020 median.
- There were 14 cases that settled for less than $2 million in 2021 (historically referred to by commentators as nuisance suits).[5] This compares to an annual average of 10 such settlements during the 2012–2020 period.
- Both the average settlement and median settlement amounts in 2021 were the lowest since 2017. *(See Appendix 1 for an analysis of settlements by percentiles.)*

Nearly 60% of settlements in 2021 were for less than $10 million.

- As noted in prior research, three law firms (The Rosen Law Firm, Pomerantz LLP, and Glancy Prongay & Murray LLP) have accounted for more than half of securities class action filings in recent years, and those filings have been dismissed at a higher rate overall than those with other lead plaintiff counsel.[6] For cases that progressed to a settlement in 2021 with one or more of these three firms acting as lead counsel, the median settlement amount was 76% lower than the median for cases involving other lead plaintiff counsel. These three firms were involved as lead counsel in 31 settled cases in 2021, compared to 19 in 2020.

Figure 3: Distribution of Settlements
2012–2021

(Dollars in millions)



Type of Claim

Rule 10b-5 Claims and "Simplified Tiered Damages"

"Simplified tiered damages" uses simplifying assumptions to estimate per-share damages and trading behavior for cases involving Rule 10b-5 claims. It provides a measure of potential shareholder losses that allows for consistency across a large volume of cases, thus enabling the identification and analysis of potential trends.[7]

Cornerstone Research's prediction model finds this measure to be the most important factor in predicting settlement amounts.[8] However, this measure is not intended to represent actual economic losses borne by shareholders. Determining any such losses for a given case requires more in-depth economic analysis.

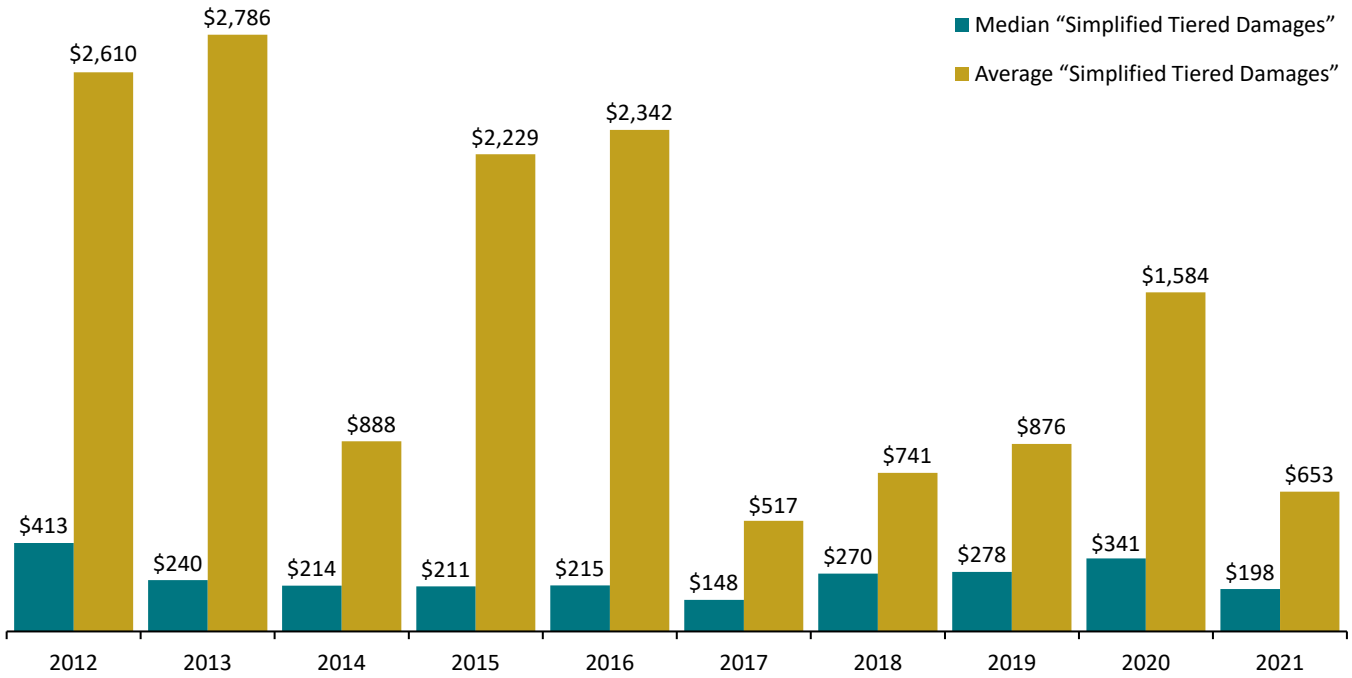
- Similar to settlement amounts, the average "simplified tiered damages" in 2021 declined to the lowest level since 2017. *(See Appendix 5 for additional information on median and average settlements as a percentage of "simplified tiered damages.")*

Median "simplified tiered damages" was the lowest since 2017 and the second lowest in the last decade.

- Median values provide the midpoint in a series of observations and are less affected than averages by outlier data. The decrease in median "simplified tiered damages" in 2021 indicates a decline in the number of larger cases relative to 2020 (e.g., cases with "simplified tiered damages" exceeding $250 million).
- Smaller "simplified tiered damages" are typically associated with smaller issuer defendants (measured by total assets or market capitalization of the issuer). However, the median market capitalization of issuer defendants[9] in settled cases increased 30% over 2020, in part reflecting the upward market trend through the end of 2021.

Figure 4: Median and Average "Simplified Tiered Damages" in Rule 10b-5 Cases
2012–2021

(Dollars in millions)

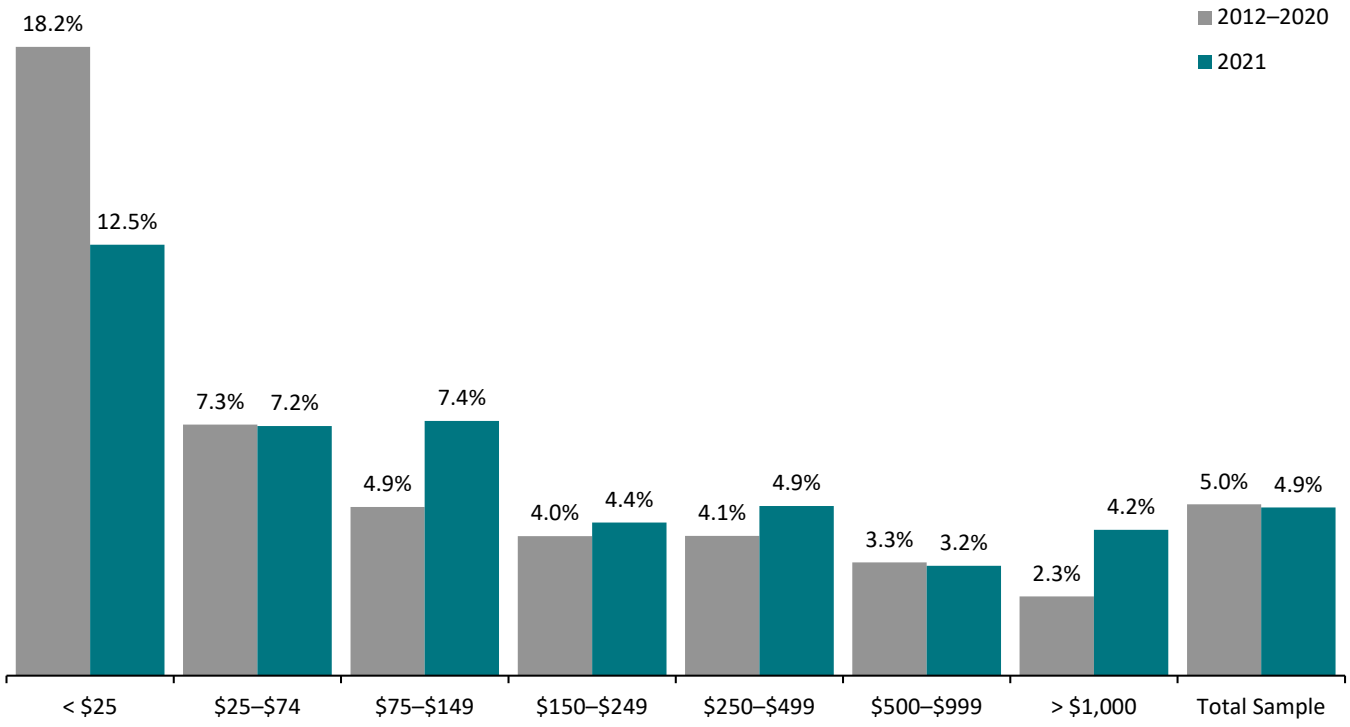


Note: "Simplified tiered damages" are adjusted for inflation based on class period end dates for common stock only; 2021 dollar equivalent figures are presented. Damages are estimated for cases alleging a claim under Rule 10b-5 (whether alone or in addition to other claims).

- Cases with larger "simplified tiered damages" are more likely to be associated with factors such as institutional lead plaintiffs, related SEC actions, or criminal charges. *(See Analysis of Settlement Characteristics on pages 9–12 for additional discussion of these factors.)*
- Among cases with Rule 10b-5 claims, the median class period length declined 20% in 2021 from the median class period length observed in 2020, explaining, in part, the relatively low median "simplified tiered damages."
- Fourteen settlements in 2021 had "simplified tiered damages" less than $25 million, the largest proportion of such cases in more than 15 years.
- Cases with less than $25 million in "simplified tiered damages" typically settle more quickly. In 2021, these cases settled within 2.5 years on average, compared to about four years for cases with "simplified tiered damages" greater than $500 million.
- Half of the cases settled in 2021 with "simplified tiered damages" of less than $25 million involved issuers that had been delisted from a major exchange and/or declared bankruptcy prior to settlement.
- Very large cases (more than $1 billion in "simplified tiered damages") typically settle for a smaller percentage of such damages. However, compared to cases with "simplified tiered damages" between $150 million and $1 billion, this pattern did not hold in 2021.

Figure 5: Median Settlements as a Percentage of "Simplified Tiered Damages" by Damages Ranges in Rule 10b-5 Cases 2012–2021

(Dollars in millions)



Note: Damages are estimated for cases alleging a claim under Rule 10b-5 (whether alone or in addition to other claims).

’33 Act Claims and “Simplified Statutory Damages”

For ’33 Act claim cases—those involving only Section 11 and/or Section 12(a)(2) claims—shareholder losses are estimated using a model in which the statutory loss is the difference between the statutory purchase price and the statutory sales price, referred to here as “simplified statutory damages.” Only the offered shares are assumed to be eligible for damages.[10]

“Simplified statutory damages” are typically smaller than “simplified tiered damages,” in part reflecting differences in the methodologies used to estimate alleged damages per share, as well as differences in the shares eligible to be damaged. As such, settlements as a percentage of “simplified statutory damages” may be higher than the percentages observed among Rule 10b-5 settlements.

- However, for the first time since 2014, the median settlement as a percentage of “simplified statutory damages” was lower than the median settlement as a percentage of “simplified tiered damages.” In 2021, the median settlement as a percentage of “simplified statutory damages” was 4.4%, 10% lower than the median “simplified tiered damages” of 4.9%. *(See Appendix 6 for additional information on median and average settlements as a percentage of “simplified statutory damages.”)*

The median settlement value for ’33 Act claim cases in 2021 was $8.4 million, largely unchanged from 2020 ($8.6 million).

- In 2021, the number of settlements in cases with only ’33 Act claims was nearly double the annual average from 2017 to 2020.
- Cases involving ’33 Act claims typically resolve more quickly than cases involving Rule 10b-5 (Exchange Act) claims. In 2021, however, the median interval from filing date to settlement hearing date for both case types narrowed to within 10%.

Figure 6: Settlements by Nature of Claims
2012–2021

(Dollars in millions)

	Number of Settlements	Median Settlement	Median “Simplified Statutory Damages”	Median Settlement as a Percentage of “Simplified Statutory Damages”
Section 11 and/or Section 12(a)(2) Only	77	$8.9	$142.2	7.6%

	Number of Settlements	Median Settlement	Median “Simplified Tiered Damages”	Median Settlement as a Percentage of “Simplified Tiered Damages”
Both Rule 10b-5 and Section 11 and/or Section 12(a)(2)	116	$16.0	$406.9	6.1%
Rule 10b-5 Only	543	$7.9	$215.2	4.8%

Note: Settlement dollars and damages are adjusted for inflation; 2021 dollar equivalent figures are presented.

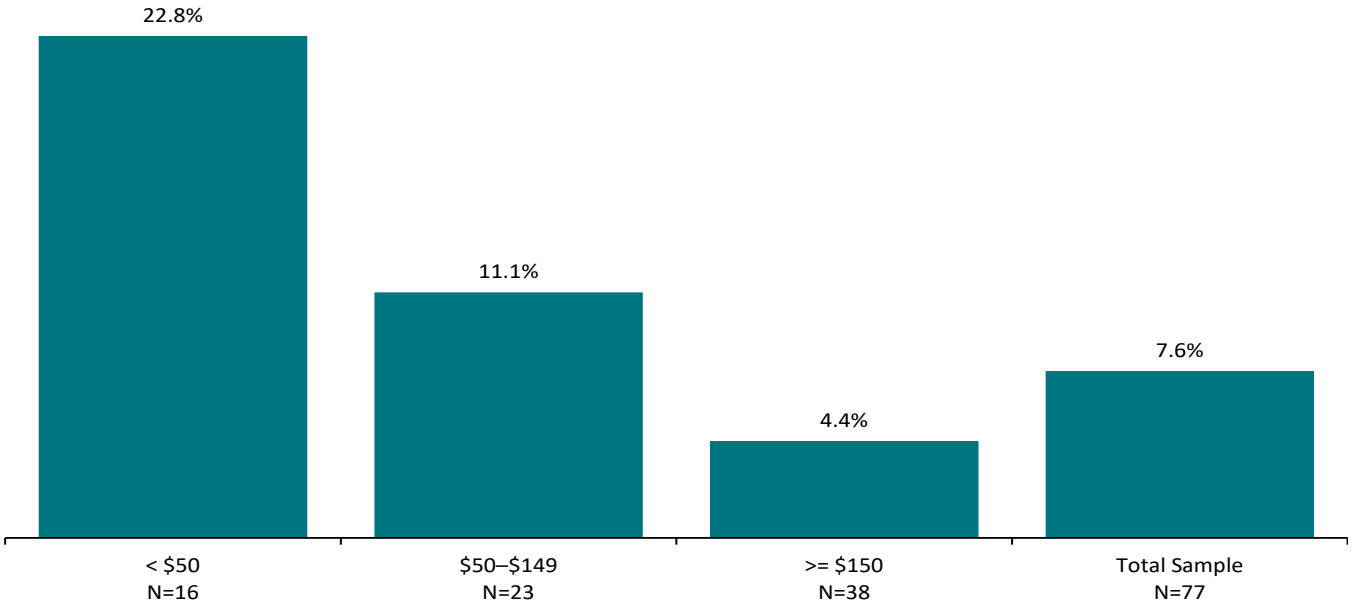
- More than 80% of cases with only ’33 Act claims involved an initial public offering (IPO).
- In 2021, 88% of the settled ’33 Act claim cases involved an underwriter (or underwriters) as a named codefendant.
- Among those cases with identifiable contributions, D&O liability insurance provided, on average, more than 90% of the total settlement fund for ’33 Act claim cases from 2012 to 2021.[11]
- Median “simplified statutory damages” in 2021 was the highest since 2014, and double the median in 2020.

As noted in previous reports, the March 2018 U.S. Supreme Court decision in *Cyan Inc. v. Beaver County Employees Retirement Fund* (*Cyan*) held that ’33 Act claim securities class actions could be brought in state court. While ’33 Act claim cases had often been brought in state courts before *Cyan*, filing rates in state courts increased substantially following this ruling. This trend reversed, however, following the March 2020 Delaware Supreme Court decision in *Salzberg v. Sciabacucchi* upholding the validity of federal forum-selection provisions in corporate charters.[12]

- In 2021, among ’33 Act claim only cases filed post-*Cyan* but prior to the *Sciabacucchi* ruling, 13 have settled, six of which were filed in state court.[13]
- In the years since the *Cyan* decision, an increase in the number of overlapping or parallel suits has been observed—for example, a ’33 Act claim case filed in state court that is related to a Rule 10b-5 claim case filed in federal court.[14] The number of these overlapping suits that settled in 2021 was nearly triple the average from 2017 to 2020.

Figure 7: Median Settlements as a Percentage of “Simplified Statutory Damages” by Damages Ranges in ’33 Act Claim Cases 2012–2021

(Dollars in millions)



Jurisdictions of Settlements of ’33 Act Claim Cases

	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
State Court	1	1	0	2	4	5	4	4	7	6
Federal Court	3	7	2	3	6	3	4	5	1	10

Note: “N” refers to the number of cases. Table does not include parallel suits.

Analysis of Settlement Characteristics

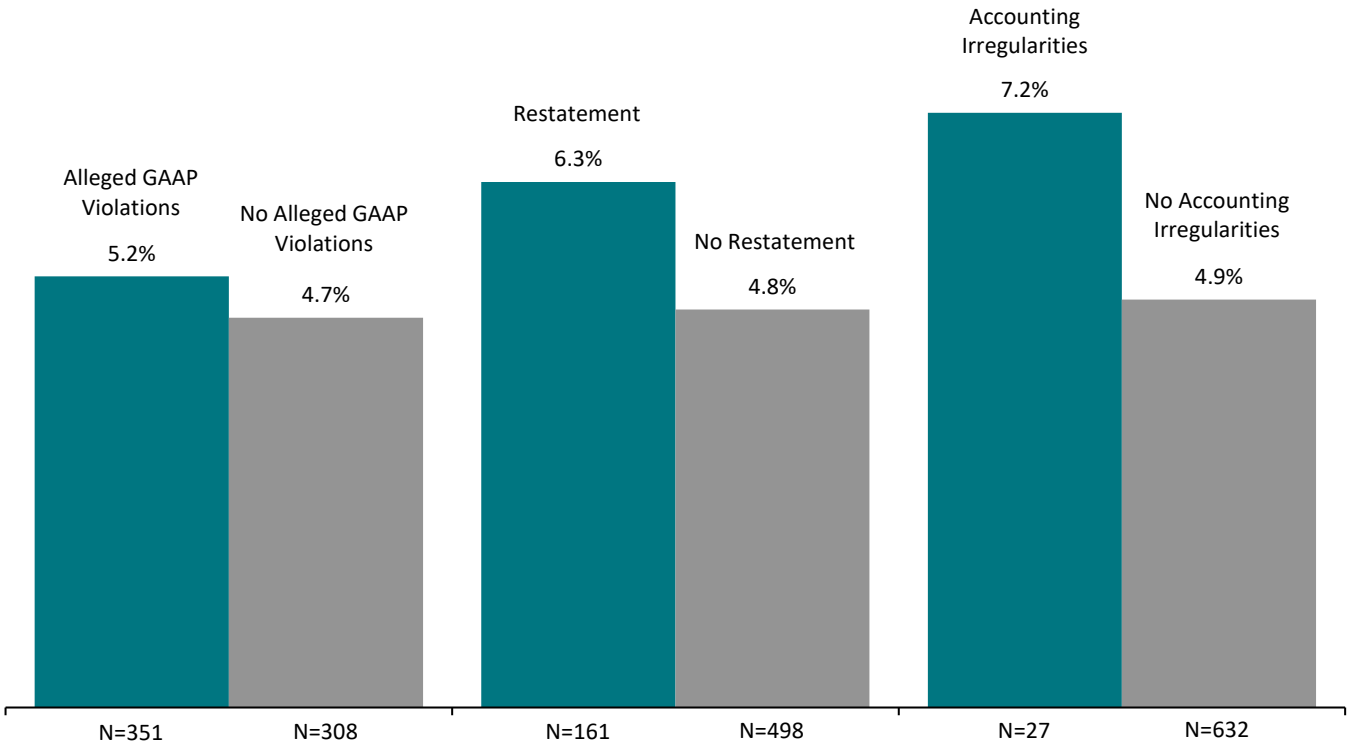
GAAP Violations

This analysis examines allegations of GAAP violations in settlements of securities class actions involving Rule 10b-5 claims, including two sub-categories of GAAP violations—financial statement restatements and accounting irregularities.[15] For further details regarding settlements of accounting cases, see Cornerstone Research's annual report on *Accounting Class Action Filings and Settlements*.[16]

- In 2021, median "simplified tiered damages" for cases involving GAAP allegations were 38% higher than the 2012–2020 median for such cases.
- As this research has observed, settlements as a percentage of "simplified tiered damages" for cases involving GAAP allegations are typically higher than for non-GAAP cases. This is true even as the rate of accounting allegations has declined in recent years. For example, only 14% of settlements in 2021 involved a restatement of financial statements.
- The frequency of an outside auditor codefendant has declined substantially in recent years. In 2021, an outside auditor was a codefendant in just 3% of settlements.
- The frequency of reported accounting irregularities among settlements from 2017 to 2021 was also low, at just 3.5% of cases. Of those cases, more than 50% also involved criminal charges/indictments related to the allegations in the class action.

The proportion of settled cases in 2021 with Rule 10b-5 claims alleging GAAP violations was 32%, an all-time low among all post–Reform Act years.

Figure 8: Median Settlements as a Percentage of "Simplified Tiered Damages" and Allegations of GAAP Violations 2012–2021



Note: "N" refers to the number of cases.

Derivative Actions

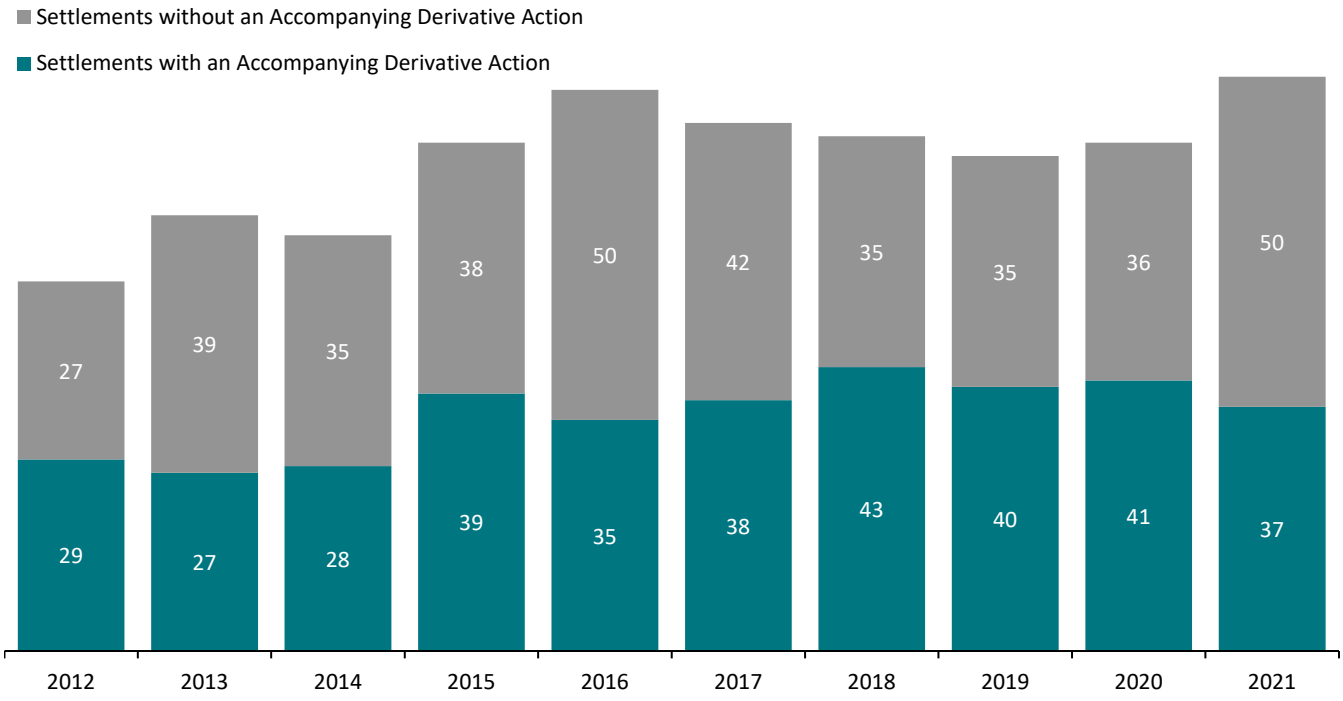
Historically, settled cases involving an accompanying derivative action have been associated with both larger cases (measured by "simplified tiered damages") and larger settlement amounts. For example, from 2012 to 2020, the median settlement for cases with an accompanying derivative action was nearly 45% higher than for cases without a derivative action.

- However, in 2021, the median settlement for cases with an accompanying derivative action was $8.5 million compared to $7.5 million for cases without a derivative action, a difference of 13%.
- In 2021, median "simplified tiered damages" for settled cases with an accompanying derivative action was more than double the median for cases without an accompanying derivative action.

In 2021, 43% of settled cases involved an accompanying derivative action, the lowest rate in the last five years.

- For cases settled during 2017–2021, nearly one-third of parallel derivative suits were filed in Delaware. California and New York were the next most common venues for such actions, representing 22% and 13% of such settlements, respectively.

Figure 9: Frequency of Derivative Actions
2012–2021



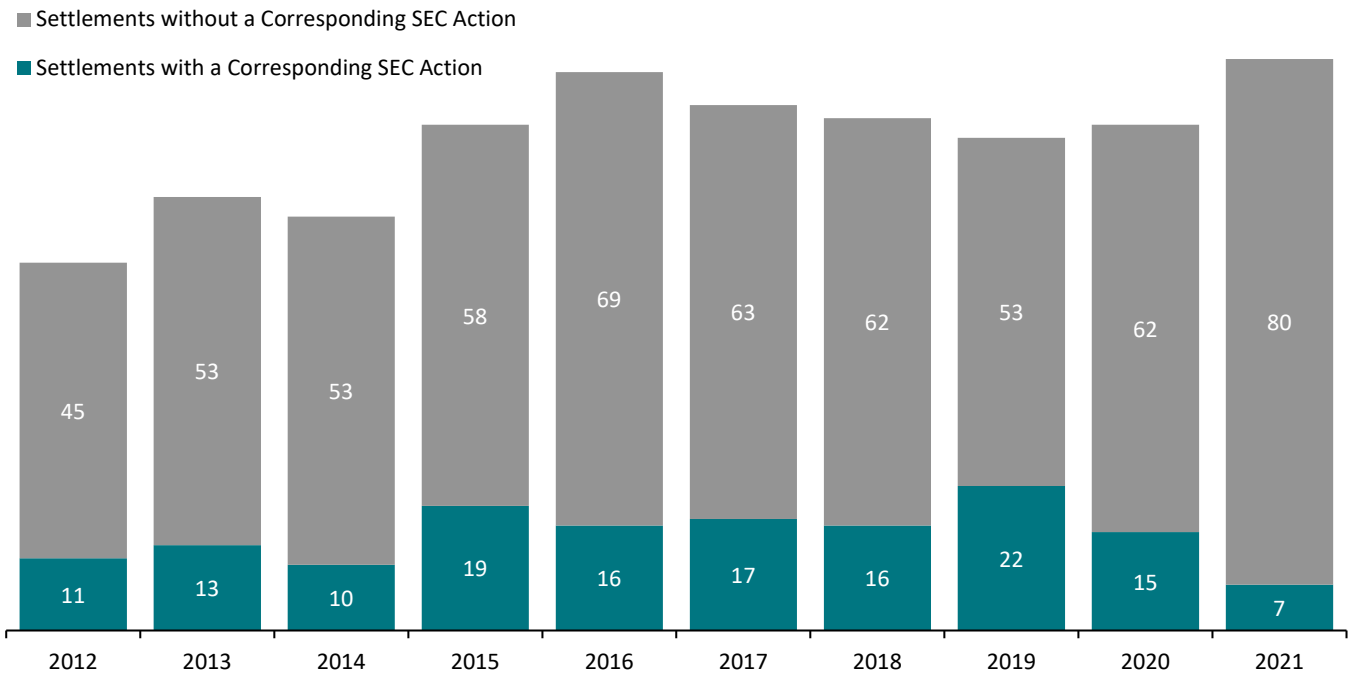
Corresponding SEC Actions

- Cases with an SEC action related to the allegations are typically associated with substantially higher settlement amounts.[17]
- In 2021, median settlement amounts for cases that involved a corresponding SEC action were double the median for cases without such an action.
- Settled cases in 2021 with a corresponding SEC action took more than 30% longer to reach settlement compared to cases without such an action. *(See page 13 for additional discussion.)*

In 2021, the number of settled cases involving a corresponding SEC action was the lowest in the past decade

- The dramatic decline in corresponding SEC actions (Figure 10) may reflect, in part, the decline in SEC enforcement activity during the filing date years associated with 2021 settlements. For additional details, see Cornerstone Research's *SEC Enforcement Activity: Public Company and Subsidiaries—FY 2021 Update*.
- Cases involving corresponding SEC actions may also include related criminal charges in connection with the allegations covered by the underlying class action. From 2017 to 2021, 40% of settled cases with an SEC action had related criminal charges.[18]

Figure 10: Frequency of SEC Actions
2012–2021



Institutional Investors

As is well known, increasing institutional participation in litigation as lead plaintiffs was a focus of the Reform Act.[19] Institutional investors are often involved in larger cases, that is, cases with higher "simplified tiered damages" and higher total assets.

- In 2021, for cases involving an institutional investor as lead plaintiff, median "simplified tiered damages" and median total assets were six times and 11 times higher, respectively, than the median values for cases without an institutional investor in a lead role.
- The involvement of an institutional investor as a lead plaintiff is correlated with specific law firms serving as lead plaintiff counsel. For example, over the last five years, an institutional investor served as lead plaintiff in 86% of the settled cases in which Robbins Geller Rudman & Dowd LLP and/or Bernstein Litowitz Berger & Grossman LLP served as lead plaintiff counsel. In comparison, an institutional investor served as lead plaintiff in only 15% of cases in which The Rosen Law Firm, Pomerantz, or Glancy served as lead counsel.

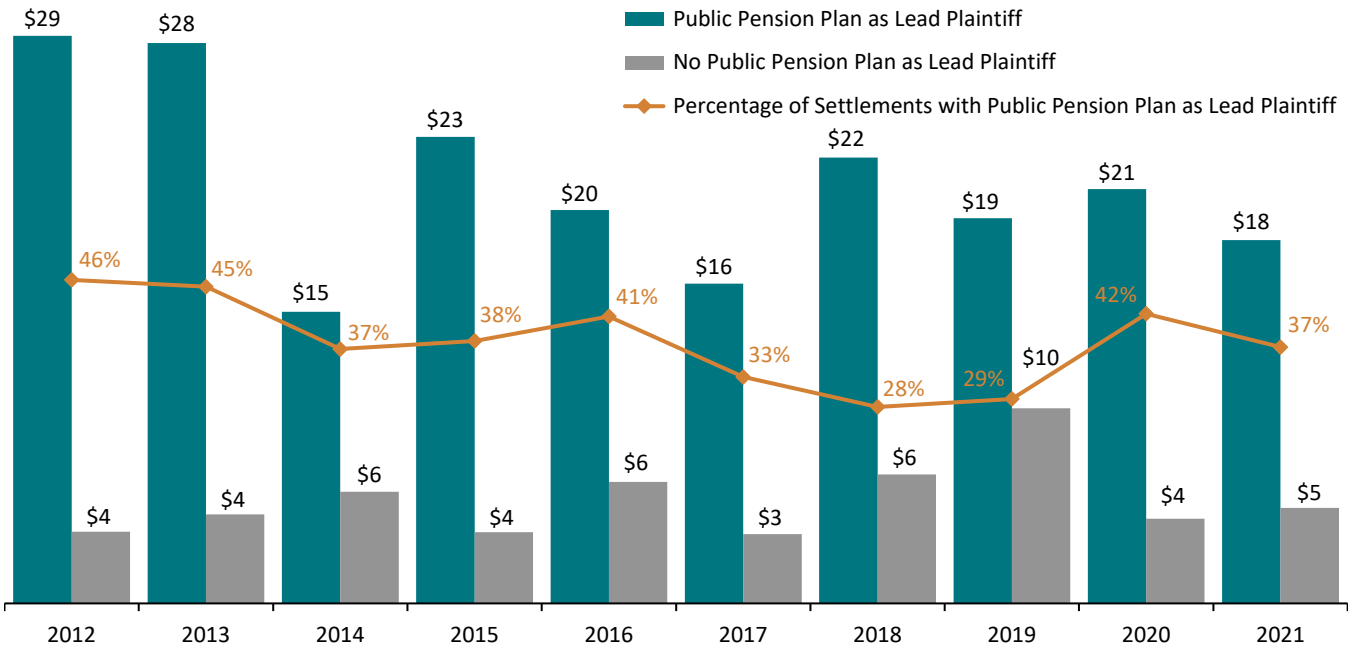
Since passage of the Reform Act, public pension plans have been the most frequent type of institutional lead plaintiff, and the presence of a public pension acting as a lead plaintiff is associated with higher settlement amounts. *(See page 15 for further discussion of factors that influence settlement outcomes.)*

- For example, for cases settled in 2021, public pension plans served as lead plaintiffs in almost 76% of cases involving institutions, while union funds appeared as lead plaintiffs in less than 10% of these cases.
- Public pensions are also more likely to be lead plaintiffs in cases involving more established publicly traded issuers. In 2021 settled cases, the median age from IPO to the filing date for cases with a public pension lead plaintiff was more than 8.5 years compared to a median of 4.3 years for cases without a public pension lead.

Among cases settled in 2021, institutional investor lead plaintiff appointments were among the lowest in more than 15 years.

Figure 11: Median Settlement Amounts and Public Pension Plans
2012–2021

(Dollars in millions)



Note: Settlement dollars are adjusted for inflation; 2021 dollar equivalent figures are presented.

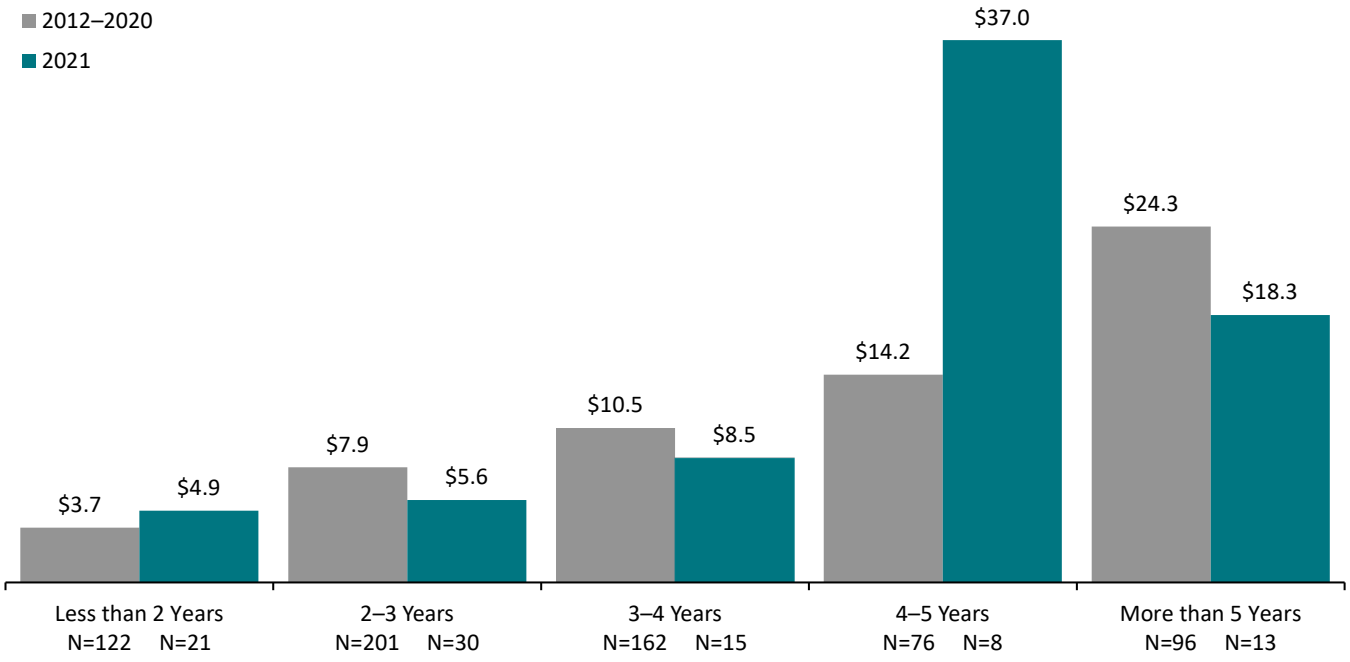
Time to Settlement and Case Complexity

- The median time from filing to settlement hearing date was 2.6 years for 2021 settlements, compared to 3.0 years for 2012–2020 settlements. This decline in the time to reach settlement was largely driven by the Ninth Circuit, where the median time to settlement declined by almost 40% in 2021.
- Larger cases (as measured by "simplified tiered damages") often take longer to resolve. Consistent with this, in 2021 all three mega settlements took at least three years to reach a settlement hearing date.
- In 2021, for cases that took at least three years to settle, median "simplified tiered damages" were more than five times higher for settlements with an institutional lead plaintiff than for those without an institutional lead plaintiff.
- Reflecting both the smaller dollar amounts and the shorter interval from filing date to settlement hearing date among 2021 settlements, the number of docket entries for these cases declined, on average, 26% from the prior year.[20]

Over 55% of cases in 2021 reached a settlement hearing date within three years of filing, compared to under 45% in 2020.

Figure 12: Median Settlement by Duration from Filing Date to Settlement Hearing Date
2012–2021

(Dollars in millions)



Note: Settlement dollars are adjusted for inflation; 2021 dollar equivalent figures are presented. "N" refers to the number of cases.

Case Stage at the Time of Settlement

In collaboration with Stanford Securities Litigation Analytics (SSLA),[21] this report analyzes settlements in relation to the stage in the litigation process at the time of settlement.

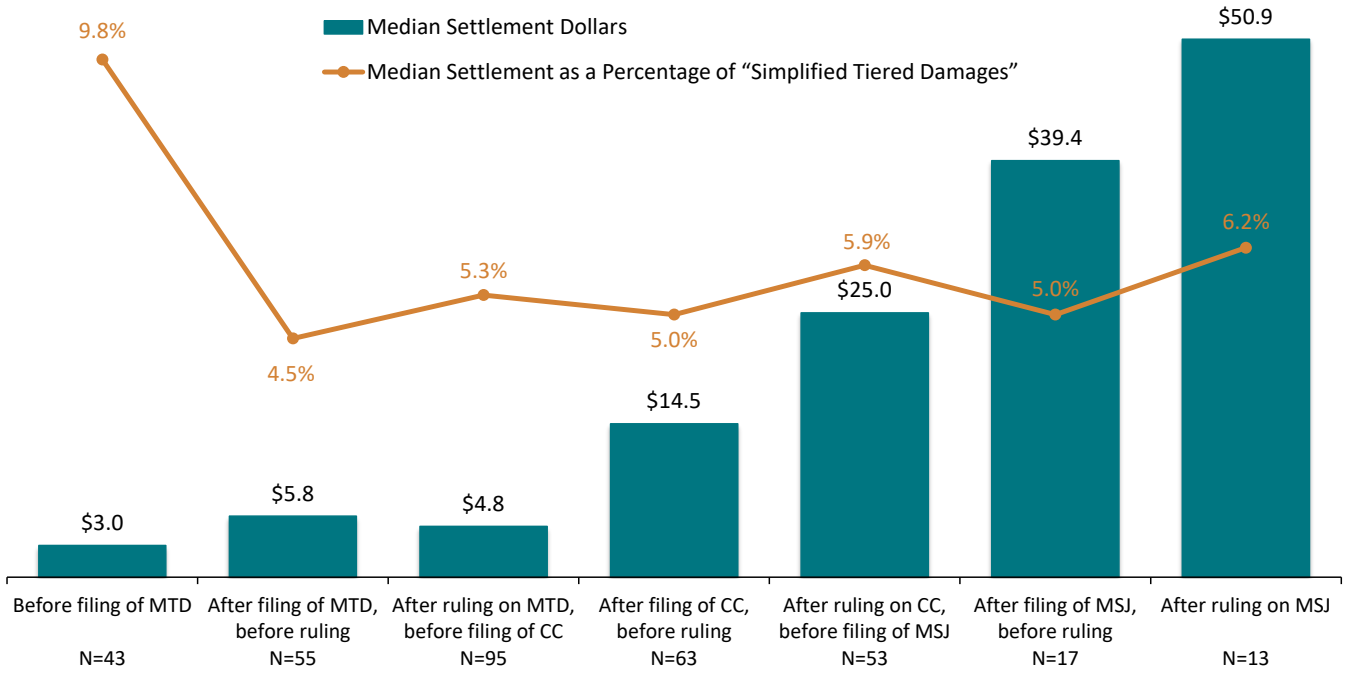
- Despite the overall smaller size of cases settled in 2021 and the shorter time to reach settlement, the stage at which cases settled remained largely unchanged. For example, in 2021, more than 60% of cases were resolved before a motion for class certification was filed, compared to 57% for 2017–2020 settlements.
- Similarly, approximately 20% of settlements in 2021 reached settlement sometime after a ruling on a motion for class certification, compared to 24% for 2017–2020 settlements.

Once a motion for class certification was filed, the median interval to the settlement hearing date for 2021 settlements was around 1.5 years.

- In 2021, cases that settled after a motion for class certification was filed were substantially larger than cases that settled at earlier stages. In particular, median "simplified tiered damages" for cases settling after a motion for class certification had been filed was more than eight times the median for cases that resolved prior to such a motion.
- Cases settling at later stages in 2021 were also larger in terms of issuer size. Specifically, the median issuer-reported total assets for 2021 cases that settled after the filing of a motion for summary judgment was more than five times the median for cases that settled prior to such a motion being filed.

Figure 13: Median Settlement Dollars and Resolution Stage at Time of Settlement
2017–2021

(Dollars in millions)



Note: Settlement dollars are adjusted for inflation; 2021 dollar equivalent figures are presented. "N" refers to the number of cases. MTD refers to "motion to dismiss," CC refers to "class certification," and MSJ refers to "motion for summary judgment." This analysis is limited to cases alleging Rule 10b-5 claims.

Cornerstone Research's Settlement Prediction Analysis

This research applies regression analysis to examine the relationships between settlement outcomes and certain securities case characteristics. Regression analysis is employed to better understand and predict the total settlement amount, given the characteristics of a particular securities case. Regression analysis can also be applied to estimate the probabilities associated with reaching alternative settlement levels. It can also be helpful in exploring hypothetical scenarios, including how the presence or absence of particular factors affects predicted settlement amounts.

Determinants of Settlement Outcomes

Based on the research sample of cases that settled from January 2006 through December 2021, the factors that were important determinants of settlement amounts included the following:

- "Simplified tiered damages"
- Maximum Dollar Loss (MDL)—market capitalization change from its class period peak to post-disclosure value
- Most recently reported total assets of the issuer defendant firm
- Number of entries on the lead case docket
- Whether there were accounting allegations
- Whether there was a corresponding SEC action against the issuer, other defendants, or related parties
- Whether there were criminal charges against the issuer, other defendants, or related parties with similar allegations to those included in the underlying class action complaint
- Whether there was an accompanying derivative action
- Whether an outside auditor was named as a codefendant
- Whether Section 11 and/or Section 12(a) claims were alleged in addition to Rule 10b-5 claims
- Whether the issuer defendant was distressed
- Whether a public pension was a lead plaintiff
- Whether securities, in addition to common stock, were included in the alleged class

Regression analyses show that settlements were higher when "simplified tiered damages," MDL, issuer defendant asset size, or the number of docket entries was larger, or when Section 11 and/or Section 12(a) claims were alleged in addition to Rule 10b-5 claims.

Settlements were also higher in cases involving accounting allegations, a corresponding SEC action, criminal charges, an accompanying derivative action, a public pension involved as lead plaintiff, an outside auditor named as a codefendant, or securities in addition to common stock included in the alleged class.

Settlements were lower if the issuer was distressed.

More than 74% of the variation in settlement amounts can be explained by the factors discussed above.

Research Sample

- The database compiled for this report 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. The sample contains cases alleging fraudulent inflation in the price of a corporation's common stock.
- Cases with alleged classes of only bondholders, preferred stockholders, etc., cases alleging fraudulent depression in price, and mergers and acquisitions cases are excluded. 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 2,013 securities class actions filed after passage of the Reform Act (1995) and settled from 1996 through 2021. These settlements are identified based on a review of case activity collected by Securities Class Action Services LLC (SCAS).[22]
- The designated settlement year, for purposes of this report, corresponds to the year in which the hearing to approve the settlement was held.[23] Cases involving multiple settlements are reflected in the year of the most recent partial settlement, provided certain conditions are met.[24]

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, Refinitiv Eikon, court filings and dockets, SEC registrant filings, SEC litigation releases and administrative proceedings, LexisNexis, Stanford Securities Litigation Analytics (SSLA), Securities Class Action Clearinghouse (SCAC), and public press.

Endnotes

[1] *Securities Class Action Filings—2021 Year in Review*, Cornerstone Research (2022).

[2] See, for example, Stephen J. Choi, "Do the Merits Matter Less after the Private Securities Litigation Reform Act?," *Journal of Law, Economics, and Organization* 23, no. 3 (2007).

[3] *Securities Class Action Filings—2021 Year in Review*, Cornerstone Research (2022).

[4] *Securities Class Action Filings—2021 Year in Review*, Cornerstone Research (2022).

[5] See, for example, Stephen J. Choi, Karen K. Nelson, and Adam C. Pritchard, "The Screening Effect of the Private Securities Litigation Reform Act," Law & Economics Working Paper, University of Michigan Law School (2007).

[6] *Securities Class Action Filings—2021 Year in Review*, Cornerstone Research (2022).

[7] The "simplified tiered damages" approach used for purposes of this settlement research does not examine the mix of information associated with the specific dates listed in the plan of allocation, but simply applies the stock price movements on those dates to an estimate of the "true value" of the stock during the alleged class period (or "value line"). This proxy for damages utilizes an estimate of the number of shares damaged based on reported trading volume and the number of shares outstanding. Specifically, reported trading volume is adjusted using volume reduction assumptions based on the exchange on which the issuer defendant's common stock is listed. No adjustments are made to the underlying float for institutional holdings, insider trades, or short-selling activity during the alleged class period. Because of these and other simplifying assumptions, the damages measures used in settlement outcome modeling may be overstated relative to damages estimates developed in conjunction with case-specific economic analysis.

[8] Laarni T. Bulan, Ellen M. Ryan, and Laura E. Simmons, *Estimating Damages in Settlement Outcome Modeling*, Cornerstone Research (2017).

[9] Median market capitalization as of the most recent quarter-end prior to the settlement hearing date.

[10] The statutory purchase price is the lesser of the security offering price or the security purchase price. Prior to the first complaint filing date, the statutory sales price is the price at which the security was sold. After the first complaint filing date, the statutory sales price is the greater of the security sales price or the security price on the first complaint filing date. Similar to "simplified tiered damages," the estimation of "simplified statutory damages" makes no adjustments to the underlying float for institutional holdings, insider trades, or short-selling activity.

[11] Based on data for cases where the amount contributed by the D&O liability insurer was verified in settlement materials and/or the issuer defendant's SEC filings—approximately 83% of all '33 Act claims cases. Data are supplemented with additional observations from the SSLA.

[12] *Securities Class Action Filings—2021 Year in Review*, Cornerstone Research (2022).

[13] This calculation excludes settlements with both '33 Act claims filed in state court and Rule 10b-5 claims filed in federal court.

[14] In some instances, the federal action also includes '33 Act claims.

[15] The three categories of accounting issues analyzed in Figure 8 of this report are (1) GAAP violations; (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.

[16] *Accounting Class Action Filings and Settlements—2021 Review and Analysis*, Cornerstone Research (2022), forthcoming in spring 2022.

[17] As noted previously, it could be that the merits in such cases are stronger, or simply that the presence of a corresponding SEC action provides plaintiffs with increased leverage when negotiating a settlement. For purposes of this research, an SEC action is evidenced by the presence of a litigation release or an administrative proceeding posted on www.sec.gov involving the issuer defendant or other named defendants with allegations similar to those in the underlying class action complaint.

[18] Identification of a criminal charge and/or criminal indictment based on review of SEC filings and public press. For purposes of this research, criminal charges and/or indictments are collectively referred to as "criminal charges."

[19] See, for example, Michael A. Perino, "Have Institutional Fiduciaries Improved Securities Class Actions? A Review of the Empirical Literature on the PSLRA's Lead Plaintiff Provision," St. John's Legal Studies Research Paper No. 12-0021 (2012).

[20] Docket entries reflect the number of entries on the court docket for events in the litigation and have been used in prior research as a proxy for the amount of plaintiff attorney effort involved in resolving securities cases. See Laura Simmons, "The Importance of Merit-Based Factors in the Resolution of 10b-5 Litigation," University of North Carolina at Chapel Hill Doctoral Dissertation (1996); Michael A. Perino, "Institutional Activism through Litigation: An Empirical Analysis of Public Pension Fund Participation in Securities Class Actions," St. John's Legal Studies Research Paper No. 06-0055 (2006).

[21] Stanford Securities Litigation Analytics (SSLA) tracks and collects data on private shareholder securities litigation and public enforcements brought by the SEC and the U.S. Department of Justice. The SSLA dataset includes all traditional class actions, SEC actions, and DOJ criminal actions filed since 2000. Available on a subscription basis at https://sla.law.stanford.edu/.

[22] Available on a subscription basis. For further details see https://www.issgovernance.com/securities-class-action-services/.

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

[24] This categorization is based on the timing of the settlement hearing date. If a new partial settlement equals or exceeds 50% 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% 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
2012	$72.3	$1.4	$3.2	$11.1	$41.9	$135.7
2013	$84.1	$2.2	$3.5	$7.6	$25.8	$96.0
2014	$20.9	$1.9	$3.3	$6.9	$15.1	$57.2
2015	$45.0	$1.5	$2.5	$7.4	$18.6	$107.5
2016	$79.7	$2.1	$4.7	$9.7	$37.3	$164.8
2017	$20.4	$1.7	$2.9	$5.8	$16.9	$39.2
2018	$70.0	$1.6	$3.9	$12.1	$26.7	$53.0
2019	$29.7	$1.6	$6.0	$11.7	$21.2	$53.0
2020	$57.1	$1.5	$3.5	$10.6	$20.9	$55.7
2021	$20.5	$1.7	$3.1	$8.3	$17.9	$58.6

Note: Settlement dollars are adjusted for inflation; 2021 dollar equivalent figures are presented.

Appendix 2: Settlements by Select Industry Sectors 2012–2021

(Dollars in millions)

Industry	Number of Settlements	Median Settlement	Median "Simplified Tiered Damages"	Median Settlement as a Percentage of "Simplified Tiered Damages"
Financial	99	$16.2	$409.5	5.1%
Technology	101	$8.6	$228.9	4.7%
Pharmaceuticals	107	$7.0	$215.2	4.7%
Retail	37	$10.5	$254.7	4.3%
Telecommunications	23	$9.3	$278.8	5.4%
Healthcare	19	$12.3	$152.8	6.7%

Note: Settlement dollars and "simplified tiered damages" are adjusted for inflation; 2021 dollar equivalent figures are presented. "Simplified tiered damages" are calculated only for cases involving Rule 10b-5 claims.

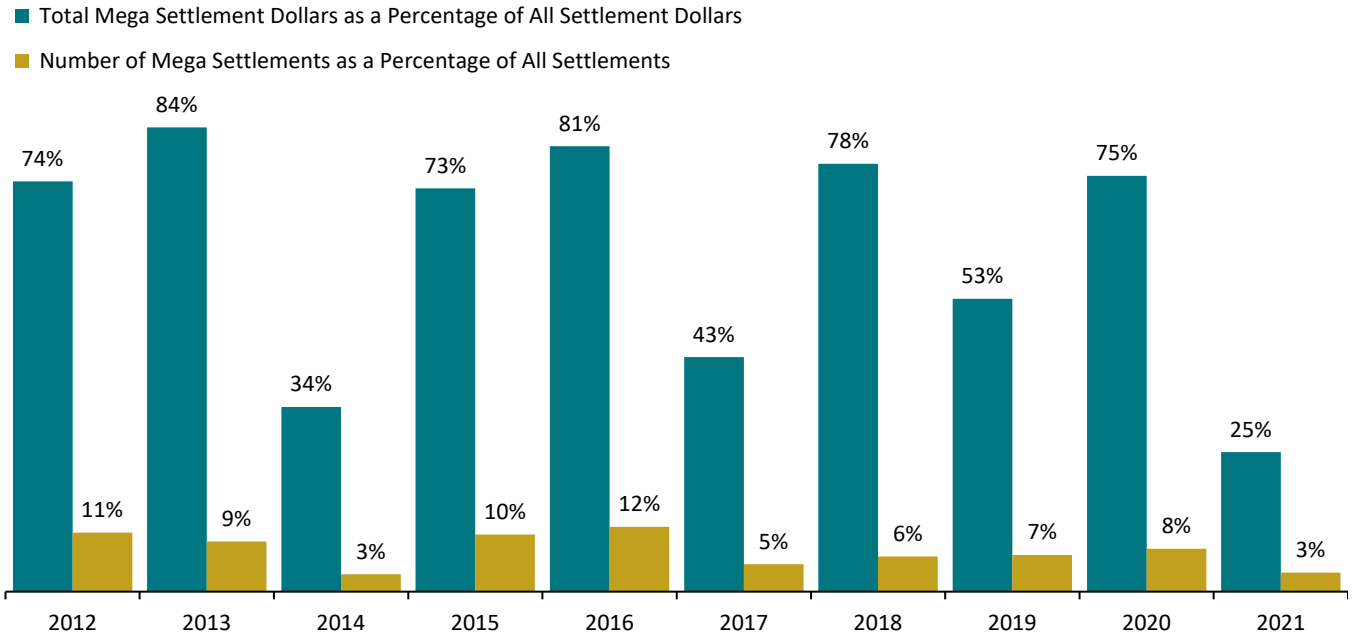
Appendix 3: Settlements by Federal Circuit Court
2012–2021

(Dollars in millions)

Circuit	Number of Settlements	Median Settlement	Median Settlement as a Percentage of "Simplified Tiered Damages"
First	20	$10.8	3.2%
Second	192	$9.3	5.1%
Third	65	$7.0	5.6%
Fourth	24	$20.1	4.1%
Fifth	36	$9.9	5.0%
Sixth	30	$13.3	7.4%
Seventh	35	$14.2	3.9%
Eighth	13	$14.7	6.8%
Ninth	183	$6.9	4.9%
Tenth	17	$8.5	5.3%
Eleventh	38	$11.0	4.9%
DC	4	$24.8	2.2%

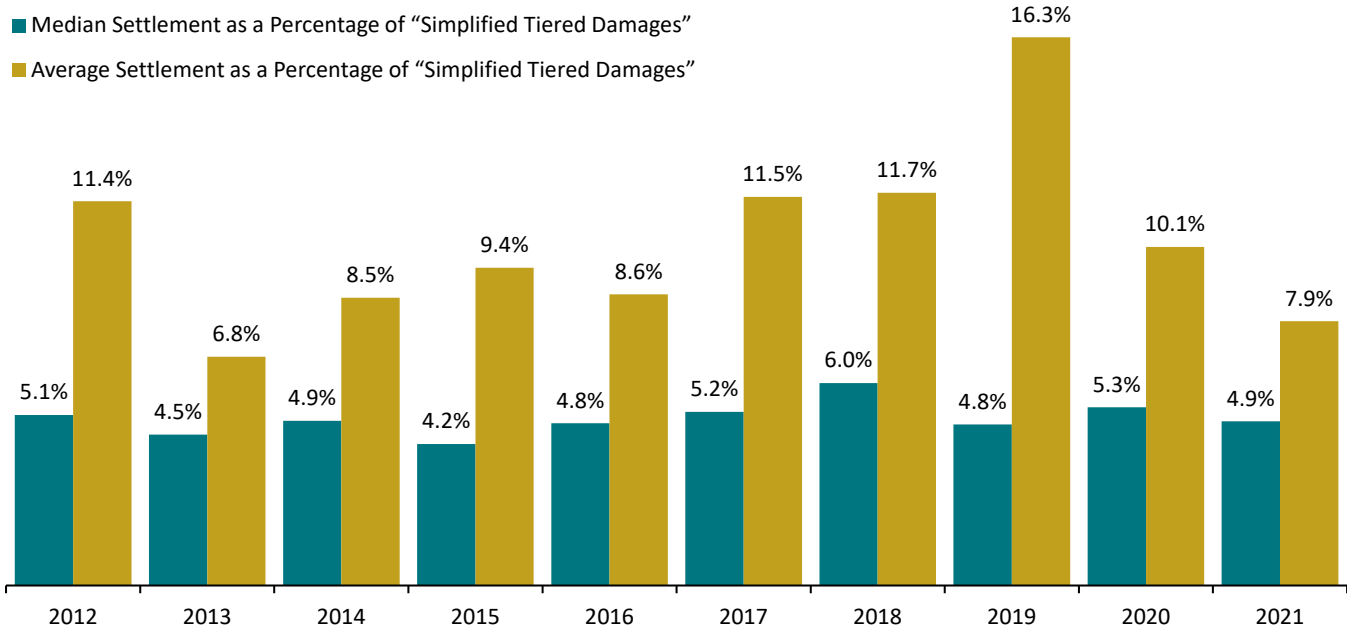
Note: Settlement dollars are adjusted for inflation; 2021 dollar equivalent figures are presented. Settlements as a percentage of "simplified tiered damages" are calculated only for cases alleging Rule 10b-5 claims.

Appendix 4: Mega Settlements
2012–2021



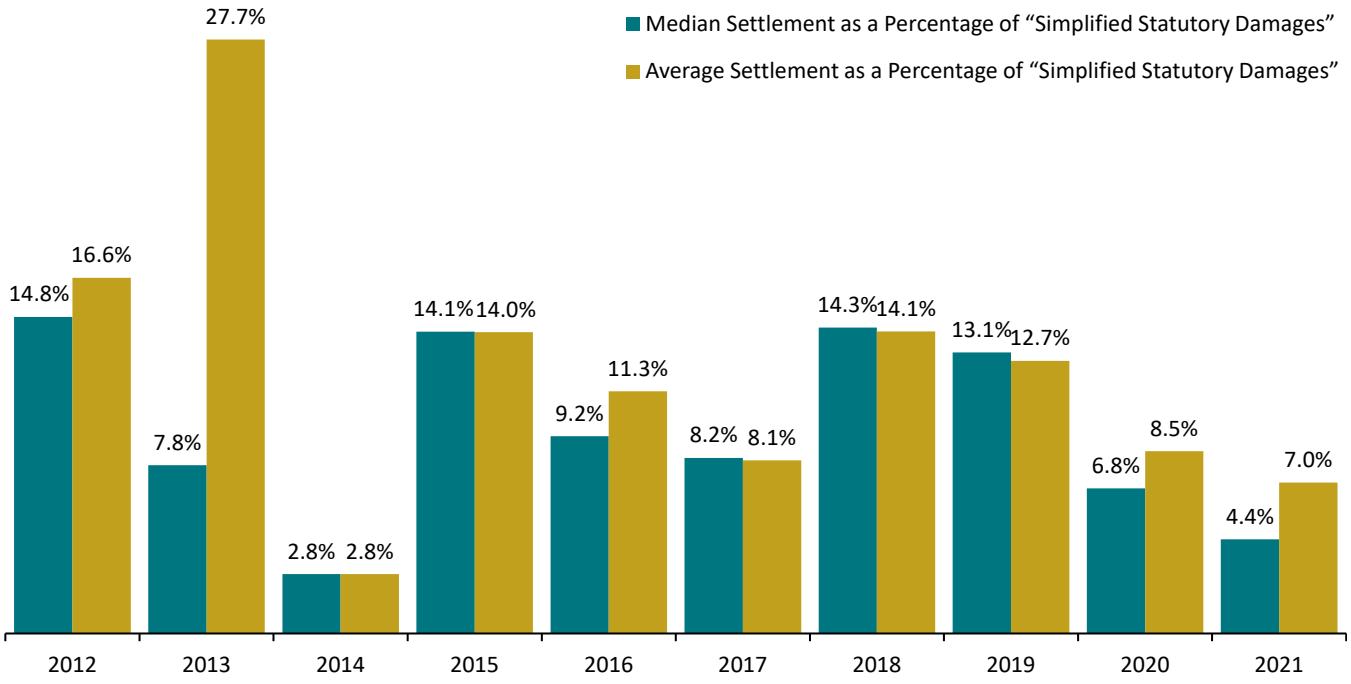
Note: Mega settlements are defined as total settlement funds equal to or greater than $100 million. Settlement dollars are adjusted for inflation; 2021 dollar equivalent figures are presented.

Appendix 5: Median and Average Settlements as a Percentage of "Simplified Tiered Damages" 2012–2021



Note: "Simplified tiered damages" are calculated only for cases alleging Rule 10b-5 claims.

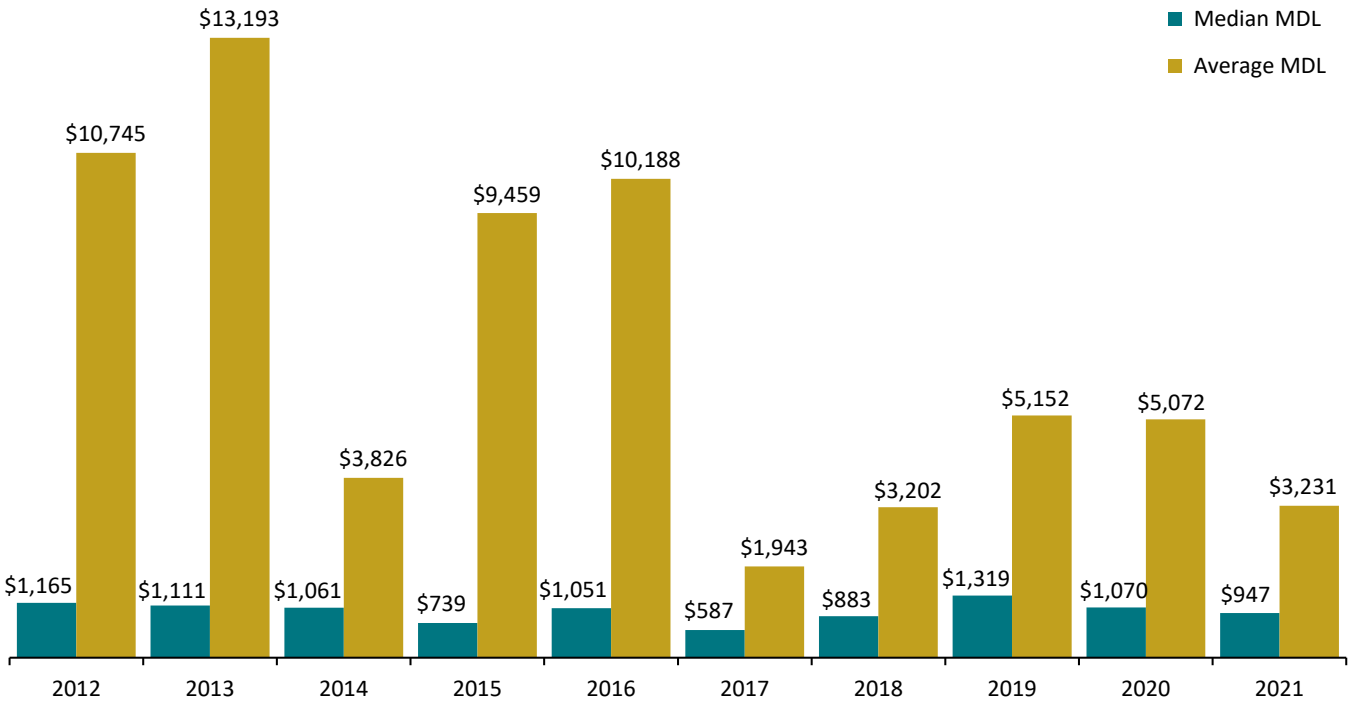
Appendix 6: Median and Average Settlements as a Percentage of "Simplified Statutory Damages" 2012–2021



Note: "Simplified statutory damages" are calculated only for cases alleging Section 11 ('33 Act) claims and no Rule 10b-5 claims.

Appendix 7: Median and Average Maximum Dollar Loss (MDL) 2012–2021

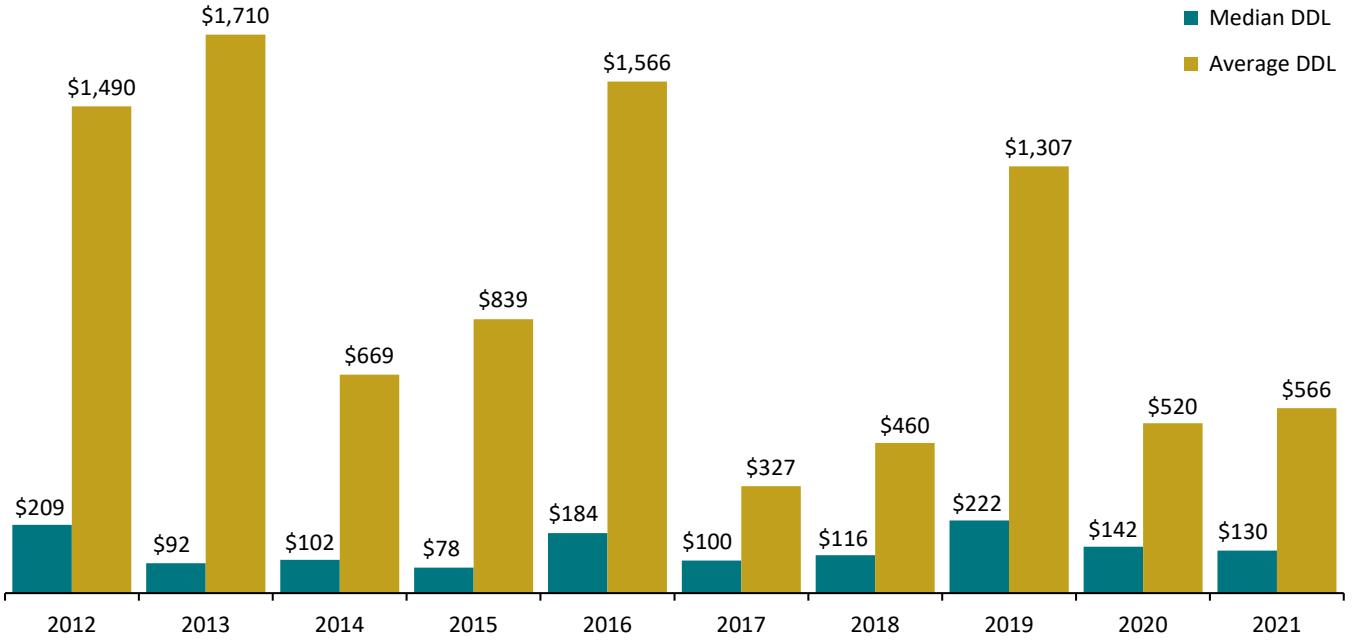
(Dollars in millions)



Note: MDL is adjusted for inflation based on class period end dates; 2021 dollar equivalents are presented. MDL is the dollar value change in the defendant firm's market capitalization from the trading day with the highest market capitalization during the class period to the trading day immediately following the end of the class period.

Appendix 8: Median and Average Disclosure Dollar Loss (DDL) 2012–2021

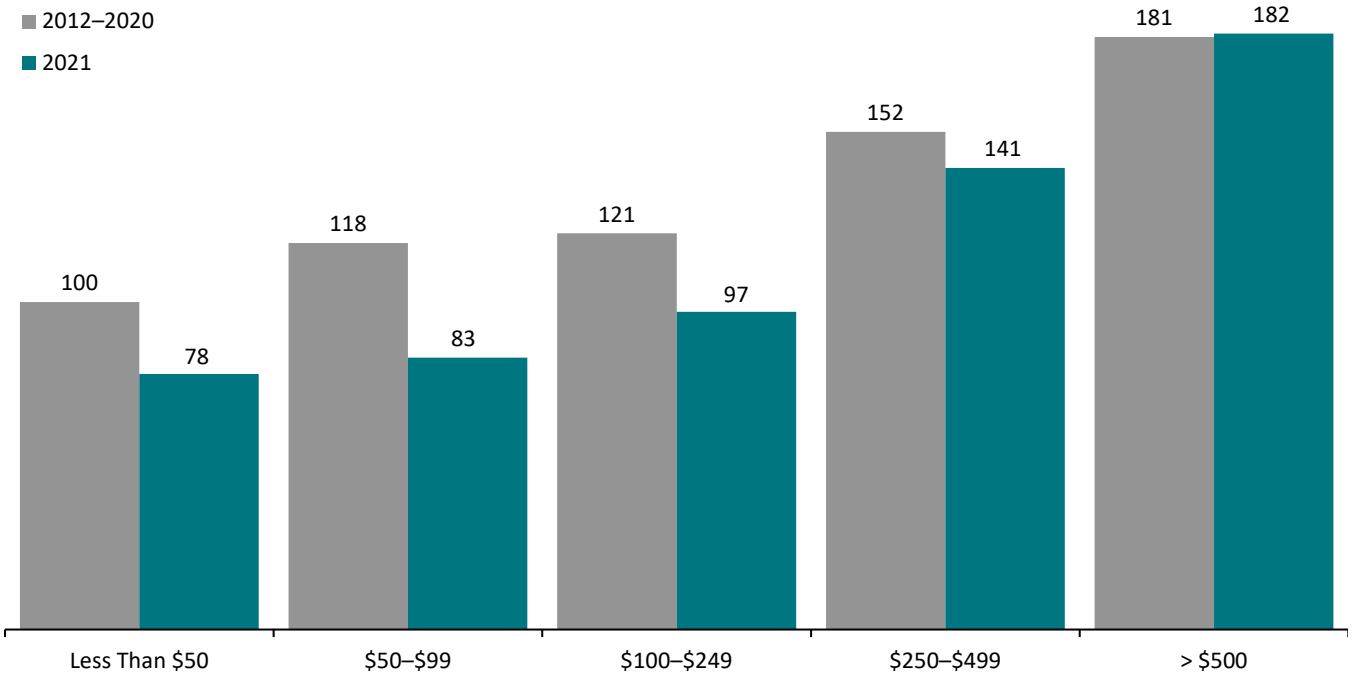
(Dollars in millions)



Note: DDL is adjusted for inflation based on class period end dates; 2021 dollar equivalents are presented. DDL is the dollar value change in the defendant firm's market capitalization between the trading day immediately preceding the end of the class period and the trading day immediately following the end of the class period. This analysis excludes cases alleging '33 Act claims only.

Appendix 9: Median Docket Entries by "Simplified Tiered Damages" Range 2012–2021

(Dollars in millions)



Note: "Simplified tiered damages" are calculated only for cases alleging Rule 10b-5 claims.

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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 and other complex litigation addressing class certification, damages, and loss causation issues, firm valuation, and corporate governance, executive compensation, and risk management issues. She has also consulted on cases related to insider trading, market manipulation and trading behavior, financial institutions and the credit crisis, derivatives, foreign exchange, and securities clearing and settlement.

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