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No. 90946-6
WASHINGTON STATE SUPREME COURT

GREGG BECKER,

Plaintiff,

v.

COMMUNITY HEALTH SYSTEMS, INC. d/b/a COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION d/b/a COMMUNITY HEALTH SYSTEMS PSC, INC. d/b/a ROCKWOOD CLINIC P.S.; and ROCKWOOD CLINIC, P.S.,

Defendants.

COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION: *BECKER* UNDERMINES THE PUBLIC POLICY OF HONESTY IN FINANCIAL REPORTING BY PUBLIC COMPANIES

Financial fraud, by its nature, is hidden by its perpetrators. In an SEC-reporting company, one of the few in a position to become aware of attempted fraud is the CFO. But how to incentivize CFOs to come forward and report on incidents of attempted fraud? In 2002, Congress determined that the best way to ferret financial fraud in public companies is to extend comprehensive protection **to whistleblowers**. *See Day v. Staples, Inc.*, 555 F.3d 42, 52 (1st Cir. 2009) (Congress enacted SOX whistleblower protection in response to the "corporate code of silence" that "not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity.") (quoting S. Rep. No. 107-146, at 5 (2002)).

Congress did **not** adopt any protections for a CFO who, instead of whistleblowing, simply refuses to participate in the attempted fraud and then suffers retaliation. (Respondent Gregg Becker alleges this is his situation.) It is for good reason that Congress did not extend protection to non-whistleblowers who merely refuse to participate in the fraud: Such protections would undermine the public policy of incentivizing CFOs to step forward and report attempted fraud. In short, Congress did not extend protections to those who merely refuse to participate in the fraud, but do not whistleblow, because such silent non-offenders perpetuate the "corporate code of silence" that "creates a climate where ongoing wrongdoing can occur with virtual impunity." *Id.* (quoting S. Rep. No. 107-146, at 5).

As the Court of Appeals acknowledged, SOX whistleblower remedies are "comprehensive." *Becker v. Community Health Systems, Inc.*, 182 Wn. App. 935, 948, 332 P.3d 1085 (2014). Unfortunately, the Court of Appeals in *Becker*, by giving to **silent** non-offenders within SOX-governed organizations the same protections that Congress extended to whistleblowers, undermines the important public policy of encouraging public company CFOs and other SOX-governed employees to step forward and report attempted fraud. Post-*Becker*, why should an honest CFO in Washington, who is suffering retaliation, bother to whistleblow? Under *Becker*, a whistleblowing CFO gets no additional protections beyond what he would already be entitled to under state law by remaining silent. *Becker* thwarts the critical federal mandate of incentivizing whistleblowing by those in a position to block securities fraud; *Becker* instead encourages public company CFOs to remain silent, flee, and sue for private benefit. *Becker* has the unintended perverse effect of undermining the at-issue public policy of honesty in financial reporting by public companies.

In the unique circumstances of SEC-reporting and other SOX-governed companies' employees who believe they are witnessing fraud, the public policy is not furthered by a private suit for constructive discharge.

Becker promotes the employee's personal interests at the expense of the public's interests. That is not what the limited tort for wrongful discharge is meant to do.

The entire thrust of the enforcement scheme of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, is inducing CFOs such as Becker to report to authorities instances of threatened securities fraud so that agencies such as the SEC and the DOJ can take action to prevent the fraud and prosecute companies attempting to commit fraud. The requirement that CFOs whistleblow, and not merely refuse to participate in the fraud in order to recover for retaliation, is necessary to ensure that agencies have the information they need to protect the public.

If an employee reports suspected securities fraud and his company retaliates against him, the employee can first pursue a SOX retaliation complaint through the Department of Labor. Under SOX, such an employee is entitled to take discovery and have his case heard at a full hearing in front of an Administrative Law Judge. If the Administrative Law Judge does not issue a decision within 180 days after the whistleblower files his complaint, ***the claimant can file his claim directly in federal court and benefit from every procedural tool available to a federal court plaintiff.*** Even if the OSHA investigation results in rejection of the employee's claims on the merits, the employee still can file his claims directly in federal court ***and the***

employee's claims receive de novo review. Thus, **a SOX whistleblower claimant gets two bites at the apple**; an adverse merits ruling at the first administrative stage does not impede in any way the employee's identical claim in federal district court. There is no such pro-claimant two-bites process available under state law.

Remedies under SOX include "all relief necessary to make the employee whole," including reinstatement with same seniority status, back pay with interest, and compensation for any special damages, including litigation costs. *See* 18 U.S.C. § 1514A(c). The Court of Appeals is correct that SOX remedies are "comprehensive." *Becker*, 182 Wn. App. at 948.

Given these robust statutory remedies, a SOX-governed company's employee who furthers the public policy by whistleblowing does not need an additional state-law cause of action against his employer under the public policy tort. The public policy tort was intended to be a narrow exception to the terminable-at-will doctrine that was available only when other means of protecting the public policy are inadequate. Here, allowing Becker to pursue a public policy tort claim against defendants is not necessary to protect the public policy and, as explained above, would undermine public policy by removing public companies' employees' incentive to whistleblow. Division

III's *Becker* decision should be reversed.[1]

II. ISSUES FOR REVIEW

1. Should the Court of Appeals' decision be reversed because giving a wrongful discharge tort claim to a corporate officer or employee of an SEC-reporting company or other SOX-governed company, who resigns his employment without whistleblowing, undermines the comprehensive scheme of remedies created by Congress, which requires such persons to report the alleged securities fraud so that action can be taken to protect the public?

2. Should the Court of Appeals' decision be reversed because an employee of an SEC-reporting or other SOX-governed company who whistleblows has an adequate remedy under SOX, and the public policy tort was not intended to provide an additional remedy when the employee can already receive "all relief necessary to make the employee whole" (18 U.S.C. § 1514A(c)(1))?

III. STATEMENT OF THE CASE

On February 27, 2012, Becker filed a Complaint in Spokane County Superior Court, alleging a state law claim for wrongful discharge in violation of public policy. (CP 3–22; 724–749) Becker is the former CFO of

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[1] The proper result in this case, not extending to Becker a state-law claim for wrongful discharge, can properly be limited to employees of SEC-reporting and other companies subject to the SOX whistleblower statute.

Rockwood Clinic, P.S. ("Rockwood"), alleged to be a subsidiary of Community Health Services, Inc. ("CHSI"), a publicly traded holding company that must file reports with the SEC. (CP 726–729)[2] The Complaint alleges that Becker was constructively discharged because he would have been required to "engage in improper accounting practices and corporate fraud" if he had continued in his job. (CP 773–774)

Defendants filed a motion to dismiss under CR 12(b)(6) because Becker cannot satisfy the jeopardy element of his public policy claim. (CP 802–820, 1318) The Superior Court denied the motion but dismissed Becker's claims against CHSI for lack of personal jurisdiction.[3] (CP 1024–26) Defendants Rockwood and Community Health Systems Professional Services Corporation ("CHSPSC") appealed, and the Court of Appeals affirmed. (A-001–035)

IV. ARGUMENT

The Court of Appeals recognized that SOX provides "comprehensive" (*Becker*, 182 Wn. App. at 948) whistleblower protections

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[2] Though Becker was CFO of Rockwood, not CHSI, he is covered by SOX. SOX whistleblower protection extends to employees of "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of [a publicly traded] company." *See* 18 U.S.C. § 1514A. Because Rockwood's financial information is included in the consolidated financial statements of CHSI, a publicly traded company (CP 726–729), Rockwood's employees are covered by SOX.

[3] The Court of Appeals' decision erroneously refers to CHSI as a petitioner. *See Becker*, 182 Wn. App. at 938. The claims against CHSI were dismissed. CHSI is not a party and is not a petitioner. Community Health Systems Professional Services Corporation and Rockwood are the only remaining defendants and are the only petitioners.

but nevertheless held that Becker established the jeopardy element. Even though Becker is pursuing whistleblower claims through the SOX administrative procedure, and even though Becker could today file his SOX claim in federal court[4] and, if he prevails on the merits, would be entitled to all relief necessary to make him whole, Division III posited that if Becker were not *also* allowed to pursue a state-law wrongful discharge claim, employees in his position might be discouraged from refusing to violate financial reporting requirements.

If this Court were to affirm, the narrow exception to the terminable-at-will doctrine would be expanded beyond recognition. More important, as to companies subject to SEC reporting requirements and therefore governed by SOX, *Becker* encourages employees to quit without reporting suspected securities fraud. And this induced silence undermines the regulatory scheme designed by Congress to protect the public policy of honesty in financial reporting by SEC-reporting companies.

A. Financial Reporting By Public Companies is One of the Most Regulated Subjects of Federal Law

Division III held that the many statutes and regulations governing honesty in financial reporting "provide comprehensive criminal, civil, and administrative enforcement mechanisms promoting the important public

[4] Becker had the right to file in federal district court as of August 28, 2012, the 180th day after he filed his SOX claim with the Department of Labor.

policies they secure." *Becker*, 182 Wn. App. at 951. Indeed, "comprehensive" understates the potency of the federal enforcement mechanisms brought to bear on SEC-reporting companies. Over the past few decades, Congress has developed a robust scheme to promote the public policy of honesty in financial reporting. This scheme includes strict regulations, civil and criminal liability, and federal agencies given broad powers and massive budgets. Because financial reporting by public companies is so heavily regulated and subject to so much federal oversight, the regulatory scheme presented by this lawsuit is beyond what this Court has previously encountered. And this public-company regulatory scheme is unique in that it would be seriously undermined by permitting non-whistleblowers to pursue a state-law tort claim for wrongful discharge.

The federal agencies tasked with investigating and prosecuting securities fraud have enormous resources to promote the public policy of honesty in financial reporting. The SEC has a 2015 budget of **$1.5 billion** and broad powers to obtain injunctive relief, disgorgement, civil monetary penalties, and officer/director bars against any person who violates the SEC's financial reporting requirements. *See, e.g.*, 15 U.S.C. §§ 77t, 77q(a), 78j(b) and SEC Rule 10b-5 (17 C.F.R. §240.10b-5); *Budget History*, U.S. SEC. AND EXCH. COMM'N, https://www.sec.gov/foia/docs/budgetact.htm (listing SEC budget for the past 20 years). The SEC uses its powers and budget to great effect. Last year alone, the SEC collected **$4.1 billion** in penalties and disgorgements. *See* SEC AGENCY FINANCIAL REPORT FISCAL YEAR 2014, 19, http://www.sec.gov/about/secpar/secafr2014.pdf#mission. And the DOJ collected an astounding **$24.7 billion** in civil and criminal actions in 2014. *See Justice Department Collects More Than $24 Billion in Civil and Criminal Cases in Fiscal Year 2014* (Nov. 19, 2014), http://www.justice.gov/opa/pr/justice-department-collects-more-24-billion-civil-and-criminal-cases-fiscal-year-2014.

Congress also enacted a private right of action, including class actions, for shareholders to seek redress from companies and individuals who violate the securities laws. *See* 15 U.S.C. § 78j(b) and Rule 10b-5. In 2014, plaintiffs filed 170 federal class action securities lawsuits. *See* Cornerstone Research, *Securities Class Action Filings—2014 Year in Review*, at 1 (attached as Exhibit 1). This allows shareholders—the individuals who are ultimately injured by dishonest financial reporting—to directly seek compensation for their injuries from dishonest companies.

The regulatory scheme is robust and adequately promotes the public policy of honesty in financial reporting. A public policy tort claim is not necessary to promote this highly regulated public policy. In allowing Becker to pursue a public policy tort claim that is supposedly needed to encourage public company employees and other SOX-governed employees not to participate in fraud, Division III brushed aside the fact that **such participation would be a federal crime.** 18 U.S.C. § 1350(c)(1) & (2). Worse, Division III substituted its own sociological judgment for the legislative decisions leading to the federal regulatory structures. Whereas Congress, in the SEC-reporting domain, gave only to <u>whistleblowers</u> protections from retaliation (thereby incentivizing whistleblowing), Division III would remove the whistleblower requirement, thereby destroying the foundation for the federal regulatory scheme (*i.e.*, incentives for public company employees to report attempted fraud and not merely decline to participate in the fraud).

Division III's approach does nothing to prevent securities fraud, and it disrupts the comprehensive scheme Congress has been fine-tuning and heavily funding for the past few decades. Division III's decision should be reversed because of the adverse effect it will have on the very public policy it purports to protect.

B. The Public Policy Tort Should Not Be Available When the Employee Has an Adequate Alternative Remedy

The common law tort of wrongful discharge was intended to be a **narrow exception** to the terminable-at-will doctrine. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 935, 913 P.2d 377 (1996). To ensure that the tort remains a narrow exception, the jeopardy element bars claimants who cannot show that a public policy is genuinely threatened. *Id.* at 941–42. ("The jeopardy element guarantees an employer's personnel management decisions will not be challenged unless a public policy is genuinely threatened.").

If this tort is to remain a narrow exception to the terminable-at-will doctrine, the Court cannot permit a plaintiff to establish the jeopardy element when that plaintiff has an adequate alternative remedy. If an employee has an adequate alternative remedy, the absence of a wrongful-discharge tort does not threaten the public policy. *Korslund v. Dyncorp Tri-Cities Servs.*, 156 Wn.2d 168, 184, 125 P.3d 119 (2005) (holding that if there are other adequate remedies available or if the public policy is sufficiently promoted through means other than a private suit, the public policy is not in jeopardy).

In *Gardner*, this Court articulated the showing a plaintiff must make to establish the jeopardy element:

> To establish jeopardy, plaintiffs must first show they engaged in particular conduct, and the conduct *directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy. Perritt § 3.14 at 75–76.

Gardner, 128 Wn.2d at 945 (emphasis in original). *Gardner's* paraphrase of Perritt initially appears to set forth a disjunctive test: a plaintiff can establish jeopardy ***either*** because his conduct directly promotes the public policy ***or*** because it is necessary for effective enforcement of the public policy. But in the very next sentence, *Gardner* clarifies that this test is not meant to be read in the disjunctive, stating: "This burden requires a plaintiff to 'argue that other means for promoting the policy … are inadequate.'" *Id.* at 945. Thus, a plaintiff's conduct can directly promote a public policy and the plaintiff will still be unable to establish the jeopardy element unless he can show that other means of promoting the public policy are inadequate.

For more than a decade, this Court continued to interpret *Gardner* as requiring plaintiffs to establish that their conduct was necessary to enforce the public policy because other means for enforcement are inadequate, even when plaintiffs' conduct directly relates to the public policy. *See, e.g., Korslund,* 156 Wn.2d 168, 182, 125 P.3d 119 (2005) (holding that plaintiffs could not establish jeopardy, even though their conduct of reporting safety violations directly relates to the public policy of protecting health and safety, because the ERA provides comprehensive remedies).

This is for good reason. If a plaintiff can establish the jeopardy element merely by showing that his actions directly relate to the public policy even when there is an adequate alternative remedy, the wrongful-discharge tort would no longer be a narrow exception to the terminable-at-will doctrine. . Instead, the tort would be available as an alternative for plaintiffs to choose whenever they prefer it to the adequate alternative.

Thus, when an alternative remedy is available to a plaintiff, the inquiry is whether that remedy is adequate. If there is already an adequate remedy, the plaintiff cannot be allowed to pursue a wrongful discharge tort claim. Having found that SOX provides "comprehensive" whistleblower protections, *Becker*, 182 Wn. App. at 948, the Court of Appeals erred in allowing Becker to pursue a wrongful discharge tort.[5]

C. Employees Who Report Suspected SOX Violations Are Adequately Protected By the SOX Whistleblower Provisions

To further the public policy of accurate financial reporting, Congress incentivized employees and officers of publicly traded companies and their subsidiaries/affiliates to report suspected securities fraud. SOX provides a private cause of action to any covered employee or officer who is retaliated against for reporting suspected fraud against shareholders, and this report can be made to any federal agency or to any person with supervisory authority over the employee. 18 U.S.C. § 1514A(a).

SOX provides that a person who alleges discharge or discrimination

[5] Becker is a whistleblower, and he is currently pursuing a SOX whistleblower complaint. (CP 209–222, 724–748) OSHA conducted an investigation and found that Becker's claim is covered under SOX and that the SOX administrative procedure is the correct avenue for Becker to seek relief. (A-042–043) After considering all of the evidence, OSHA then determined that Becker's claim lacks substantive merit. Becker is pursuing his appeal rights under SOX. (A-055–076) The parties are currently engaged in discovery, and a trial will be held on Becker's SOX claim before an ALJ on January 19, 2016. (Supplemental Index) Moreover, because more than 180 days have passed since Becker filed his SOX complaint, Becker can file his SOX claim in federal court today and his claim would receive *de novo* review. Thus, not only does SOX provide adequate alternative remedies, Becker is pursuing those remedies at the same time he is pursuing this public policy tort claim. The public policy tort claim is absolutely not necessary under these circumstances.

in violation of section 1514A(a) may seek relief by filing a complaint with the Secretary of Labor and, if the Secretary fails to issue a decision within 180 days of the filing of the complaint, the person may file an action in the federal district court. 18 U.S.C. § 1514A(b)(1). Becker has had the right to pursue his SOX claim directly in federal court since August 2012. And Becker is not prevented from filing his claim in federal court by the OSHA decision which determined that his claims have no substantive merit. Under SOX, the OSHA decision is subject to *de novo* review in federal court, giving Becker two bites at the apple. 18 U.S.C. § 1514A(b)(1)(B). Becker's preference to have his claims heard in state court is not a sufficient reason to allow him to pursue a public policy tort.

Remedies under SOX are just as robust as those under a state tort claim and expressly include "all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c)(1). The relief may take the form of reinstatement at the same level of seniority, back pay with interest, and compensation for any special damages sustained, including litigation costs, expert witness fees and reasonable attorney fees. 18 U.S.C. § 1514A(c)(2).

In *Nunnally v. XO Communications*, No. C07-1323JLR, 2009 WL 112849, *12 (W.D. Wash. Jan. 15, 2009), Judge Robart dismissed a public policy wrongful discharge claim, holding that SOX adequately supports the public policy of protecting employees who report what they believe to be financial improprieties. The plaintiff in *Nunnally*, as in the instant case, alleged that her accusations of false financial reporting resulted in retaliation leading to constructive discharge. She argued that the administrative procedures provided by SOX were inadequate. *Id.* The Court rejected this argument because of "Sarbanes Oxley's pronouncement that an employee shall be entitled to all relief necessary to make the employee whole." *Id.* (citing 18 U.S.C. § 1514A(c)(1)).

The SOX administrative procedure is even more comprehensive than the administrative procedure under the Energy Reorganization Act ("ERA") that this Court held adequately protects the relevant public policy and is the "guidepost" by which statutory schemes are to be measured.[6] *See Korslund v. Dyncorp Tri-Cities Servs.*, 156 Wn.2d 168, 182–83, 125 P.3d 119 (2005); *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 532, 259 P.3d 244 (2011). The Court would have to overrule *Korslund* in order to hold that SOX provides inadequate protection to whistleblowers. But none of the few legitimate grounds for rejecting *stare decisis* are present here.

SOX whistleblower protection is available to employees who are told to commit an illegal act, refuse to do so, and report that their employer made such a demand. This is because requiring an employee to commit an illegal

[6] For a detailed comparison of SOX and ERA, see Petition for Review at 9–11, 12–13.

act that involves financial fraud, even if the fraud never occurs, is a violation of federal law: attempted fraud, illegal under 18 U.S.C. § 1349 regardless of whether the company completed the fraud. *See* 18 U.S.C. § 1349 ("Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

Division III acknowledged the comprehensiveness of SOX remedies but summarily held them to be "inadequate" because the statute contains a non-exclusivity clause. Division III's holding ignores the fact that the ERA statute at issue in *Korslund* has a similar provision regarding non-exclusivity. *Compare* 42 U.S.C. § 5851(h) *to* 18 U.S.C. § 1514A(d). Despite that provision, *Korslund* holds that the ERA provided the plaintiffs with adequate alternative remedies that precluded pursuit of a public policy tort claim.

Division III's error on the exclusivity issue arises from a fundamental misunderstanding of *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013). *Piel* clearly states that it does not overrule *Korslund. Id.* at 617. *Piel* is clear that even if a non-exclusivity provision exists, a court must still analyze whether the administrative scheme is adequate to "vindicate public policy." *Id. Piel* is consistent with *Korslund*, which explains the reason for such analysis:

> [T]he question is not whether the legislature intended to

> foreclose a tort claim but whether other means of protecting the public policy are adequate so that recognition of a tort claim in these circumstances is unnecessary to protect the public policy.

Korslund, 156 Wn.2d at 183. Here, the SOX administrative remedy is just as robust as the ERA's administrative remedy. Because this remedy is available to Becker, a tort claim is unnecessary to protect the public policy.

D. Employees Who Quit But Do Not Report Suspected SOX Violations Undermine the Public Policy

Division III awarded Becker a private tort cause of action, despite finding that SOX and a panoply of "statutes and regulations provide comprehensive criminal, civil, and administrative enforcement mechanisms promoting the important public policies they secure" (*Becker*, 182 Wn. App. at 951) because, the Court opined, CFOs like Becker could be "discourage[ed] from refusing to submit [] false or misleading [information]." *Id.* at 954.

But, as is clear from the above discussion (*infra* at 13–16), so long as such employees report their employer's conduct, they get the full protections of the comprehensive procedures under SOX—both administrative and in federal district court—which provide all relief necessary to make the employee whole. The public policy tort is not necessary to encourage such employees to refuse to submit false financial information, for they already have a cause of action to protect them from retaliation if, as Congress encourages, they whistleblow rather than sitting silently while the fraud proceeds without that person's participation. Moreover, ***the hypothetical employees referenced by Division III are already required by law not to submit false financial information.*** *See* 18 U.S.C. § 1350(c)(1) & (2) (imposing criminal liability on CEOs and CFOs who do not accurately report financial information). The Court of Appeals appears not to have taken this critical statute into account—a statute that removes the foundation for the Court of Appeals' analysis.

In stark terms, the Court of Appeals, without any empirical support or other evidence whatsoever, held that Becker and other SOX-protected employees must be rewarded with a state law tort claim in order to convince them not to participate in a fraud ***that would subject them to criminal prosecution.*** *See* 18 U.S.C. § 1350(c)(1) & (2). Worse, while the Court of Appeals grasps that federal efforts to combat financial fraud "depend on the employee's pro-compliance efforts," *Becker*, 182 Wn. App. at 953, the Court fails entirely to then reach the obvious conclusion compelled by Congress's public-company enforcement scheme: the critical, bedrock pro-compliance effort called for by Congress is whistleblowing—which is why SOX protects only those who whistleblow and not those who merely decline to participate in the fraud. *See Day*, 555 F.3d at 52 (SOX whistleblower protection is Congress's response to the "corporate code of silence" that "not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity.") (quoting S. Rep. No. 107-146, at 5.)

Congress could have created a private right of action for any employee who is discharged for refusing to violate financial reporting laws, even if the employee stays silent. Congress did not do so. This is for good reason: The public is ***better*** protected by encouraging employees to bring potential violations to the attention of someone with the authority to correct the problem (such as a supervisor or law enforcement agency) than by allowing employees to stay silent, quit, and sue their employers privately.

Giving such employees a private tort claim may help the employees, **but it does nothing to prevent the fraud from occurring**. A company intent on committing securities fraud will persist, even without a particular employee's acquiescence. The only way to prevent and remedy securities fraud is to bring suspected fraud to the attention of someone who can stop the company from committing fraud: either a supervisor who is not complicit in the fraud or a federal agency with the power to investigate suspected fraud and prosecute the company. *Becker* subverts this enforcement remedy and encourages public company CFOs to take the easy way out by staying silent. That is a prescription for more financial fraud.

Congress made a deliberate decision to extend protection to only those people who whistleblow, because whistleblowing is necessary for the enforcement of the public policy. In allowing an employee like Becker to seek relief through the wrongful discharge tort, Division III undermined the primary incentive for such employees to report suspected fraud: If an employee can seek relief through the wrongful discharge tort without having to whistleblow, then why go through the trouble of whistleblowing in order to obtain relief through the SOX administrative and federal court procedure?

Giving Becker a public policy tort claim does not promote the public policy of honesty in financial reporting; it undermines it. Division III's decision ensures that Becker has a cause of action at the expense of depriving appropriate law enforcement agencies of the information they need to protect the public. Division III's decision should be reversed.

V. CONCLUSION

The Court of Appeals' decision should be reversed because it promotes a single employee's interests at the cost of protecting the public from securities fraud.

Respectfully submitted this 10th day of April, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on the following:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 10th day of April, 2015.

s/Patsy Howson
Patsy Howson

EXHIBIT 1

CORNERSTONE RESEARCH
ECONOMIC AND FINANCIAL CONSULTING AND EXPERT TESTIMONY

Securities Class Action Filings

2014 Year in Review

2014 Trends | U.S. Exchange-Listed Companies | IPO Activity | MDL/DDL Values | Dismissal Rates

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NUMBER AND SIZE OF FILINGS

- Plaintiffs filed 170 new federal class action securities cases (filings) in 2014—four more than in 2013. The number of 2014 filings was 10 percent below the historical average of 189 filings observed annually between 1997 and 2013. (pages 4–5)

- The total Maximum Dollar Loss (MDL) of filings in 2014 was $215 billion, or 66 percent below the historical annual average of $630 billion. MDL was at its lowest level since 1997. (page 7)

- The total Disclosure Dollar Loss (DDL) decreased substantially in 2014, falling to its lowest level since 2006. Total DDL was $57 billion in 2014, 54 percent below the historical average of $124 billion. (page 6)

- For the first time since 1997, there were no mega DDL filings—filings with a DDL of at least $5 billion. Only two mega MDL filings—filings with an MDL of at least $10 billion—occurred in 2014, both of which related to oil and gas companies. (page 19)

While the number of filings remained essentially flat, the size of filings measured by dollar losses decreased dramatically.

OTHER MEASURES OF LITIGATION INTENSITY

- Looking at the full universe of U.S. exchange-listed companies, 3.6 percent were subject to filings in 2014, an increase from 3.4 percent in 2013. (page 9)

- Companies in the S&P 500 were less likely to be targeted by a securities class action in 2014 than in any year measured (2000 through 2014). (page 17)

- Of the S&P 500 companies, those with the largest market capitalizations were less likely than smaller firms to be the subject of a class action filing—a departure from historical experience. (page 18)

FIGURE 1: **CLASS ACTION FILINGS SUMMARY**

	Average (1997–2013)	2013	2014
Class Action Filings	189	166	170
Disclosure Dollar Loss ($ Billions)	$124	$104	$57
Maximum Dollar Loss ($ Billions)	$630	$279	$215

EXECUTIVE SUMMARY *continued*

KEY TRENDS

- **IPO activity** continued the upward trajectory that has followed the nadir of offerings in 2008 (with potential implications for future litigation). (page 10)

- The percentage of filings against **foreign issuers** increased in 2014 for the first time in three years. (pages 15–16)

- Filings against companies in the **Consumer Non-Cyclical sector**—which includes biotechnology and pharmaceutical firms—increased markedly in 2014. (pages 22–23)

- Filings against **energy companies** gained prominence in the fourth quarter of 2014 as oil and gas prices declined. (pages 19 and 22)

- Collectively, filings in the **Second and Ninth Circuits** in 2014 were more consistent with historical averages compared with the number filed last year, although total MDL and DDL declined considerably relative to historical averages. Filings in the **Third Circuit** increased to the highest level since 2004. (page 25)

Filings have increasingly targeted firms in the biotechnology and pharmaceutical industries.

NEW FOR THE *2014 YEAR IN REVIEW*

TRENDS IN THE NUMBER OF PUBLIC COMPANIES AND THEIR LITIGATION EXPOSURE

This analysis tracks the number of companies listed on U.S. exchanges, as well as the likelihood they were the subject of a class action filing. (pages 9–10)

- The number of companies listed on U.S. exchanges increased recently after a 15-year decline, due in part to the quickening pace of IPO activity in 2014.
- On major U.S. exchanges, there were 206 IPOs in 2014, a 31 percent increase from 2013.
- The likelihood that a public company was the subject of a filing remained above the historical average in each of the past five years.

Dismissal rates have continued to increase for filings in cohort years 2010, 2011, and 2012.

DISMISSAL TRENDS

This analysis revisits earlier work conducted in 2010 and 2013 examining the outcomes of class action filings. Starting in the mid-2000s, the likelihood of dismissal began increasing. (pages 12–13)

- Filings have been dismissed at a rate of 59 percent and 58 percent in cohort years 2010 and 2011, respectively. Dismissal rates for these years may edge higher as pending cases are resolved.
- For cohort year 2012, 40 percent of filings have been dismissed. Dismissal rates for this cohort year will increase as class actions are resolved for the ongoing cases filed in that year.
- Statistical tests indicate that the likelihood of dismissal remains higher for filings in recent cohorts even after controlling for filing characteristics such as filing type, industry, and circuit.

NEW DEVELOPMENTS

- *Halliburton Co. v. Erica P. John Fund* (page 26)

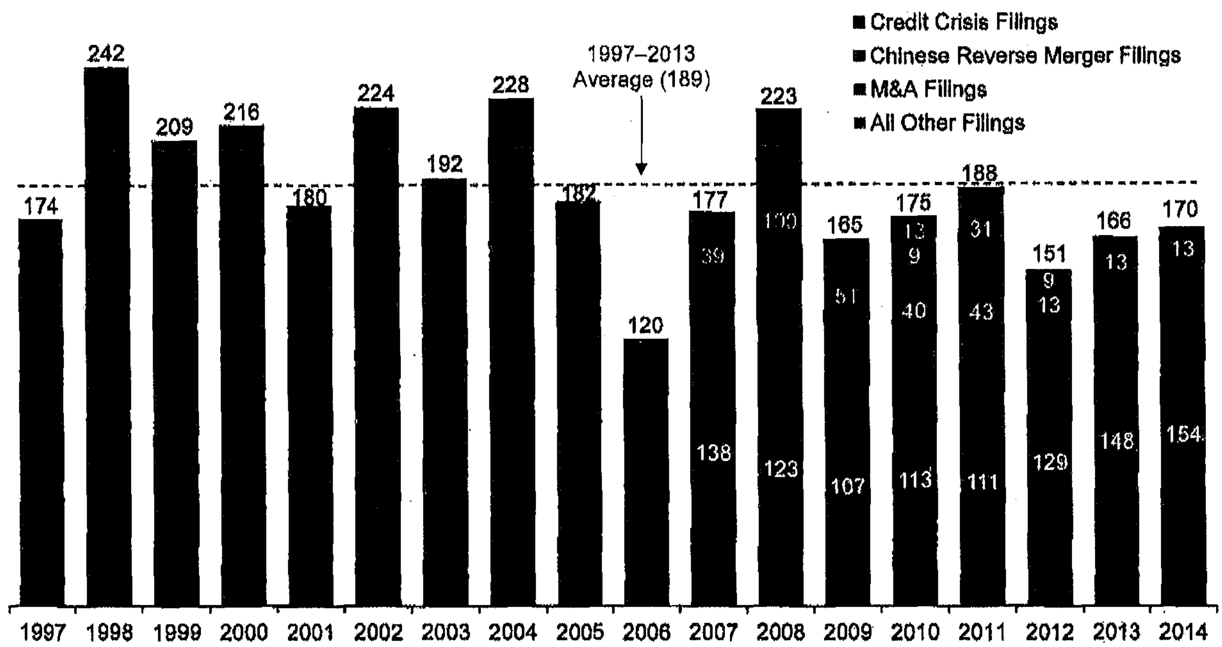
NUMBER OF FILINGS

KEY FINDINGS

- The 170 filings in 2014 represent a slight increase (2 percent) from 2013, although the number of filings continues to remain well below the 1997–2013 average of 189 filings.
- Despite the subdued total filing activity relative to the historical average, the number of "traditional filings"—those excluding credit crisis, merger and acquisition (M&A), and Chinese reverse merger (CRM) cases—was 8 percent lower than the 1997–2013 historical average of 167.
- Filings related to CRMs have waned and were minimal in 2014. Filings related to M&A transactions have persisted at the same level for the past three years.

2014 was the second consecutive year with increased filing activity.

FIGURE 2: **CLASS ACTION FILINGS (CAF) INDEX™**
ANNUAL NUMBER OF CLASS ACTION FILINGS
1997–2014



Note: There were two cases in 2011 that were both an M&A filing and a Chinese reverse merger company. These filings were classified as M&A filings in order to avoid double counting.

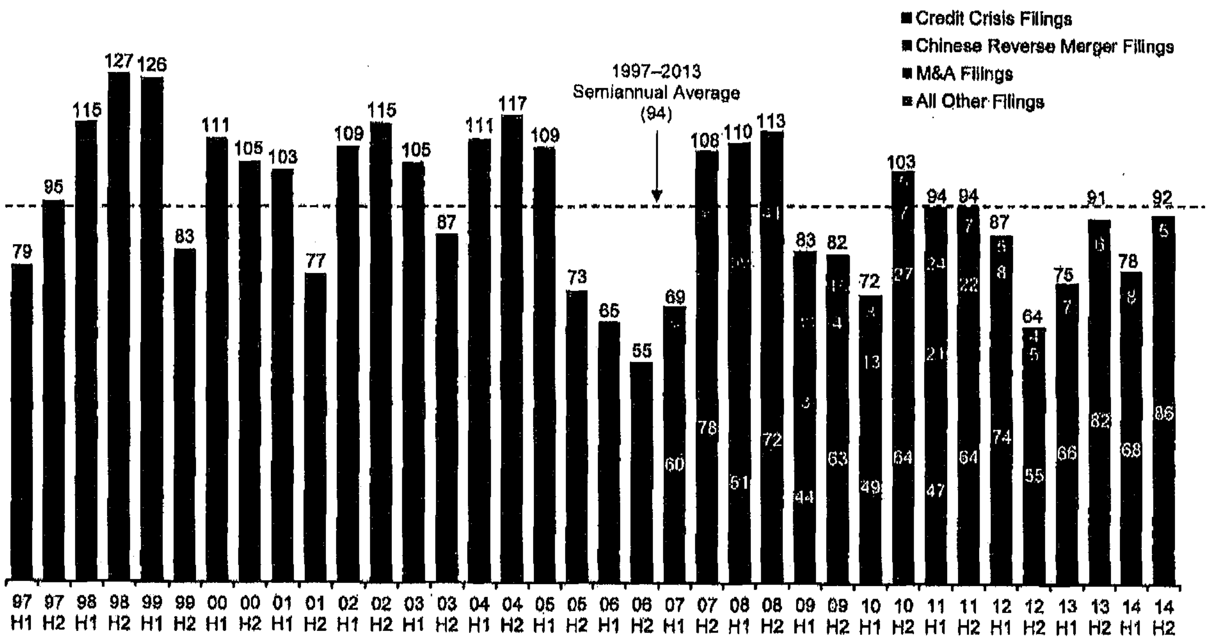
NUMBER OF FILINGS *continued*

KEY FINDINGS

- Total filing activity increased 18 percent in the second half of 2014 compared to the relatively slow pace of filings in the first half of the year.
- The sharp decline in oil and gas prices during the fourth quarter of 2014 led to an increase in filings against companies in the Energy sector and contributed to the total increase in filings during the second half of the year.
- The pattern of filing activity in 2014 was similar to 2013. In both years, filings in the second half of the year distinctly outpaced the first half.

Filing activity jumped in the second half of 2014.

FIGURE 3: **CLASS ACTION FILINGS (CAF) INDEX™ SEMIANNUAL NUMBER OF CLASS ACTION FILINGS 1997 H1–2014 H2**



Note: There were two cases in 2011 that were both an M&A filing and a Chinese reverse merger company. These filings were classified as M&A filings in order to avoid double counting.

MARKET CAPITALIZATION LOSSES

Disclosure Dollar Loss (DDL) Index™

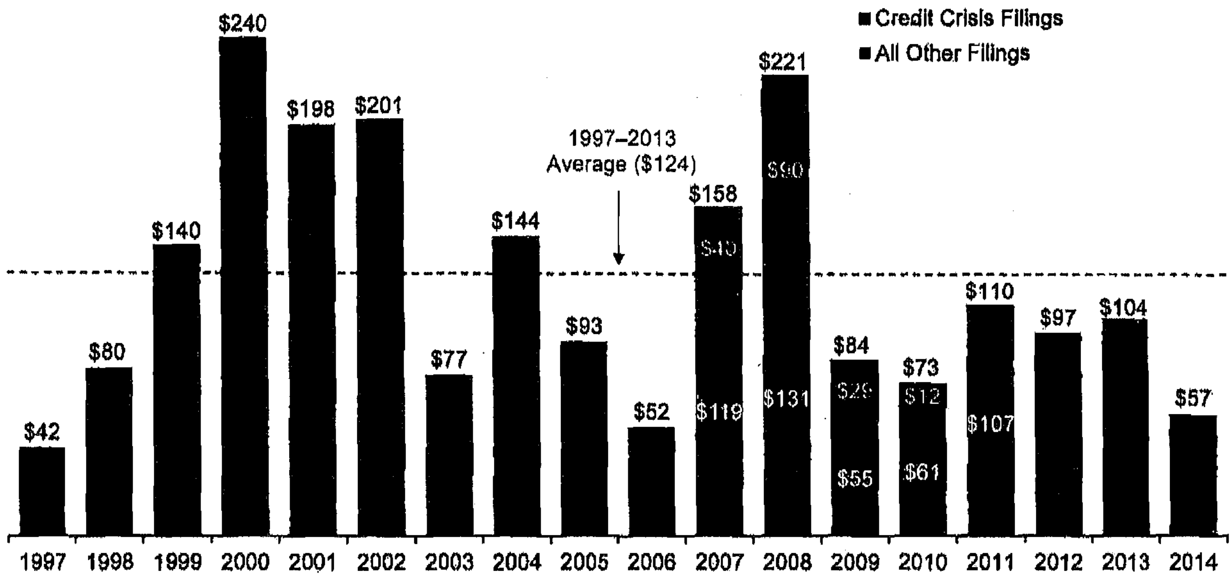
This index measures the aggregate DDL for all filings over a period of time. DDL is the dollar value change in the defendant firm's market capitalization between the trading day immediately preceding the end of the class period and the trading day immediately following the end of the class period. DDL should not be considered an indicator of liability or measure of potential damages. *See* the glossary for additional discussion on market capitalization losses and DDL.

The DDL Index fell to its lowest mark since 2006.

KEY FINDINGS

- The DDL Index decreased 45 percent from 2013 to 2014. This was the steepest annual decline since 2008 to 2009, when filings related to the credit crisis dropped.
- The decrease in 2014 is largely explained by the lack of any mega DDL filings. Filings with large DDLs typically account for a majority of the DDL Index. (page 21)
- The DDL Index was 46 percent of the 1997–2013 average.

FIGURE 4: **DISCLOSURE DOLLAR LOSS (DDL) INDEX™**
1997–2014
(Dollars in Billions)



Note:
1. See Appendix 1 for the mean and median values of DDL.
2. Numbers may not add due to rounding.

MARKET CAPITALIZATION LOSSES *continued*

Maximum Dollar Loss (MDL) Index™

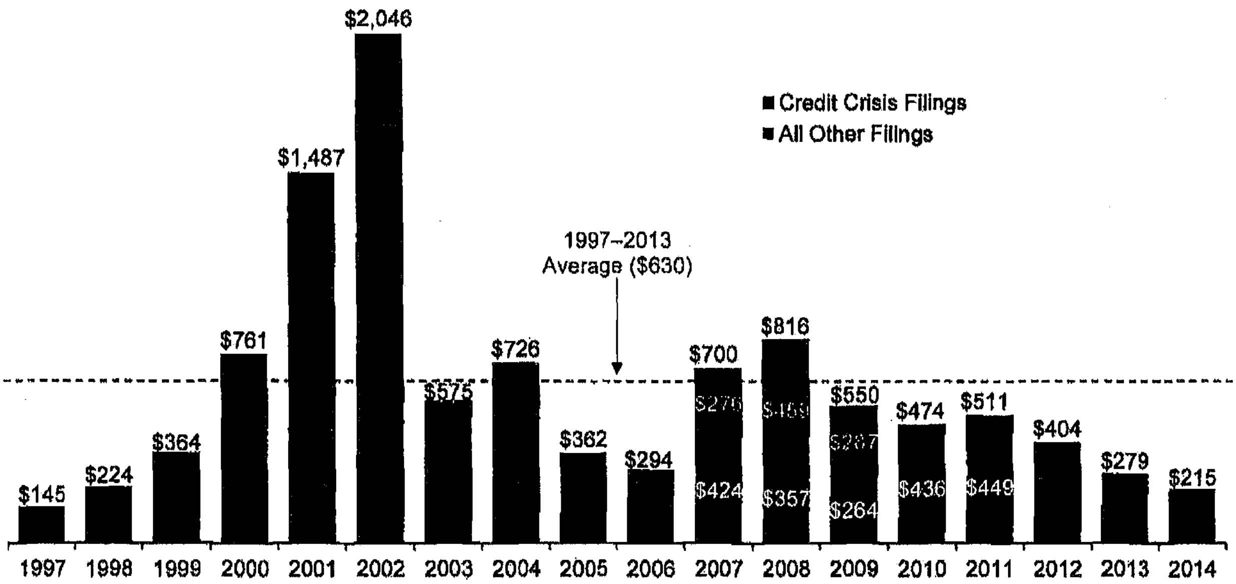
This index measures the aggregate MDL for all filings over a period of time. MDL is the dollar value change in the defendant firm's market capitalization from the trading day with the highest market capitalization during the class period to the trading day immediately following the end of the class period. MDL should not be considered an indicator of liability or measure of potential damages. *See* the glossary for additional discussion on market capitalization losses and MDL.

The MDL Index was at its lowest level since 1997.

KEY FINDINGS

- The MDL Index decreased 23 percent from 2013 to 2014. This decline is likely due in part to generally increasing market capitalizations resulting from the positive returns in equities markets in 2014.
- While filings in the oil and gas industry represented only 7 percent of total filings with MDL reported, they made up 23 percent of total MDL in 2014. This dramatic increase from 2013, when oil and gas filings comprised just 4 percent of the total MDL Index, stems from two mega filings in the oil and gas industry.

FIGURE 5: **MAXIMUM DOLLAR LOSS (MDL) INDEX™**
1997–2014
(Dollars in Billions)



Note:
1. *See* Appendix 1 for the mean and median values of DDL.
2. Numbers may not add due to rounding.

CLASSIFICATION OF COMPLAINTS

KEY FINDINGS

- For the third year in a row, the percentage of filings with Rule 10b-5 claims remained essentially unchanged in 2014 at 85 percent.
- The percentage of filings with Section 12(2) claims continued a five-year decline. However, filings with Section 11 claims increased from 9 percent in 2013 to 14 percent in 2014.
- For the first time since 2010, allegations regarding false forward-looking statements were made in less than half of filings.

The percentage of filings with allegations of GAAP violations increased 50 percent in 2014.

FIGURE 6: **2014 ALLEGATIONS BOX SCORE**
2010–2014

	Percentage of Total Filings[1]				
	2010	2011	2012	2013	2014
General Characteristics					
Rule 10b-5 Claims	66%	71%	85%	84%	85%
Section 11 Claims	15%	11%	10%	9%	14%
Section 12(2) Claims	10%	9%	9%	7%	6%
No Rule 10b-5, Section 11, or Section 12(2) Claims	23%	23%	9%	11%	9%
Underwriter Defendant	10%	11%	8%	9%	11%
Auditor Defendant	4%	3%	2%	2%	1%
Allegations					
Misrepresentations in Financial Documents	93%	94%	95%	97%	94%
False Forward-Looking Statements	45%	56%	62%	54%	47%
Insider Trading	16%	12%	17%	17%	16%
GAAP Violations[2]	26%	37%	23%	24%	36%
Announced Restatement[3]	7%	11%	11%	11%	17%
Internal Control Weaknesses[4]	23%	24%	20%	20%	24%
Announced Internal Control Weaknesses[5]	3%	6%	8%	8%	10%

Note:

1. The percentages do not add to 100 percent because complaints may include multiple allegations.
2. First identified complaint includes allegations of GAAP Violations. In some cases, plaintiff(s) may not have expressly referenced GAAP; however, the allegations, if true, would represent GAAP Violations.
3. First identified complaint includes allegations of GAAP Violations and refers to an announcement during or subsequent to the class period that the company will restate, may restate, or has financial statements that should not be relied upon.
4. First identified complaint includes allegations of Internal Control Weaknesses over Financial Reporting.
5. First identified complaint includes allegations of Internal Control Weaknesses and refers to an announcement during or subsequent to the class period that the company has Internal Control Weaknesses over Financial Reporting.
6. Additional allegations added in complaints subsequent to the first identified complaint are not captured in this analysis.

NEW ANALYSIS: LITIGATION LIKELIHOOD OF U.S. EXCHANGE-LISTED COMPANIES

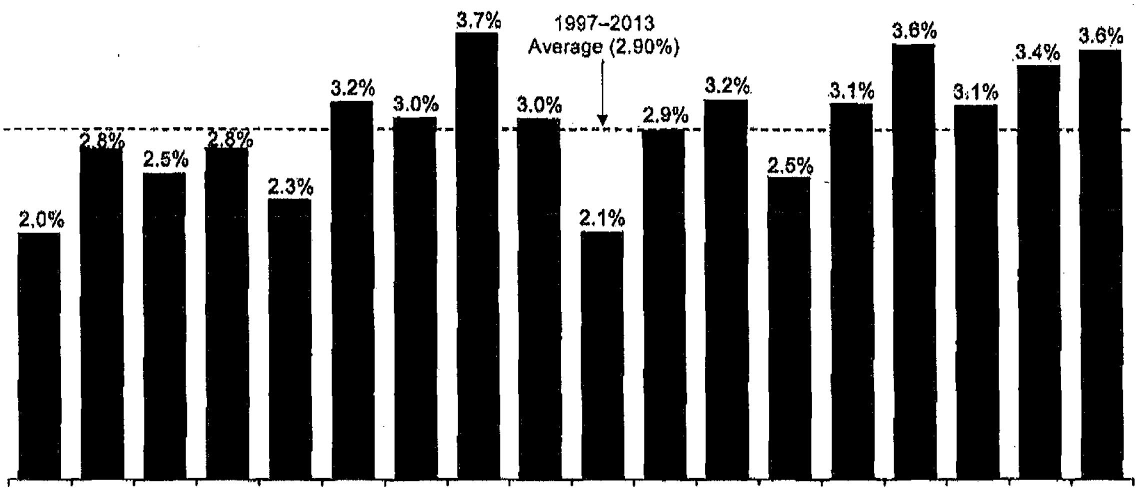
The percentage in the figure below is calculated as the unique number of companies listed on the NYSE or NASDAQ that were the subject of filings in a given year divided by the unique number of companies listed on the NYSE or NASDAQ.

KEY FINDINGS

- In 2014, approximately one in 28 companies listed on U.S. exchanges was the subject of a class action.
- The percentage of public companies subject to litigation has remained relatively constant in recent years. The declining long-term trend in the total number of filings from the late 1990s through today is a result of a decline in the number of public companies rather than a decreased likelihood of being the subject of a class action.
- The number of companies listed on U.S. exchanges increased recently after a 15-year decline. This is due in part to the quickening pace of IPO activity in 2014.

The likelihood that a public company was the subject of a filing remained above the historical average in each of the past five years.

FIGURE 7: **PERCENTAGE OF U.S. EXCHANGE-LISTED COMPANIES SUBJECT TO FILINGS AND CHANGE IN THE NUMBER OF COMPANIES LISTED ON U.S. EXCHANGES**
1997–2014



	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Number of Firms	8,190	7,771	7,418	7,197	6,474	5,999	5,843	5,593	5,525	5,467	5,339	5,042	4,764	4,660	4,529	4,411	4,416	4,578
Percent Change		[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	(0.89%)	(1.22%)	(1.06%)	(2.34%)	[illegible]	[illegible]	(2.18%)	(2.81%)	(2.61%)	0.11%	3.67%

Legend >0%

Source: Securities Class Action Clearinghouse; Center for Research in Security Prices (CRSP)

Note:

1. Percentages are calculated by dividing the count of issuers listed on the NYSE or NASDAQ subject to filings by the number of companies listed on the NYSE or NASDAQ as of the beginning of the year.
2. Listed companies were identified by taking the count of listed securities at the beginning of each year and accounting for cross-listed companies or companies with more than one security traded on a given exchange. Securities were counted if they were classified as common stock or American Depository Receipts (ADRs) and listed on the NYSE or NASDAQ.

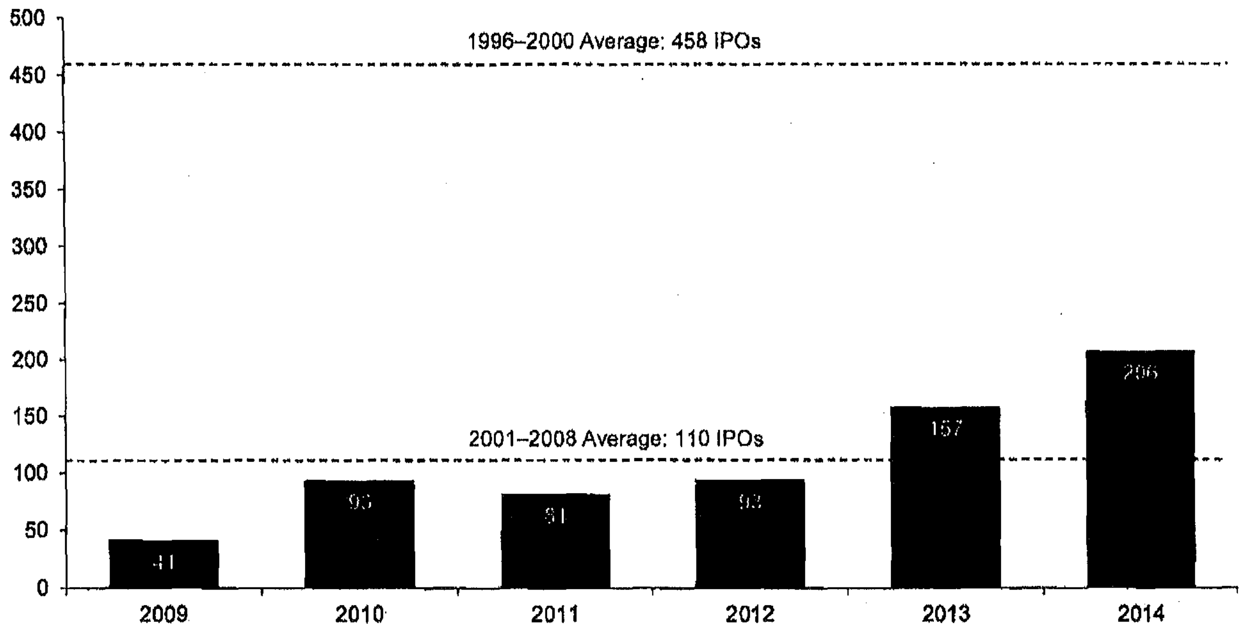
NEW ANALYSIS: IPO ACTIVITY

KEY FINDINGS

- IPO activity in 2014 increased 31 percent over IPO activity in 2013.
- While IPO activity in 2014 was at its highest level since 2000, with 206 public offerings, it was still dramatically lower than the average of 458 IPOs per year during the era of dot-com offerings in 1996–2000.
- Following a lull in IPOs during the financial crisis, the magnitude of IPO activity in recent years has been more comparable to the average of the early and mid-2000s, although activity markedly increased in both 2013 and 2014.

IPO activity increased for the third consecutive year.

FIGURE 8: **NUMBER OF IPOs ON MAJOR U.S. EXCHANGES 2009–2014**



Source: Jay R. Ritter, "Initial Public Offerings: Updated Statistics" (University of Florida, December 20, 2014)
Note: These data exclude the following IPOs: those with an offer price of less than $5, ADRs, unit offers, closed-end funds, real estate investment trusts (REITs), partnerships, small best efforts offers, banks and S&Ls, and stocks not listed in the CRSP database.

NEW ANALYSIS: NUMBER OF FILINGS WITH MDL/DDL VALUES

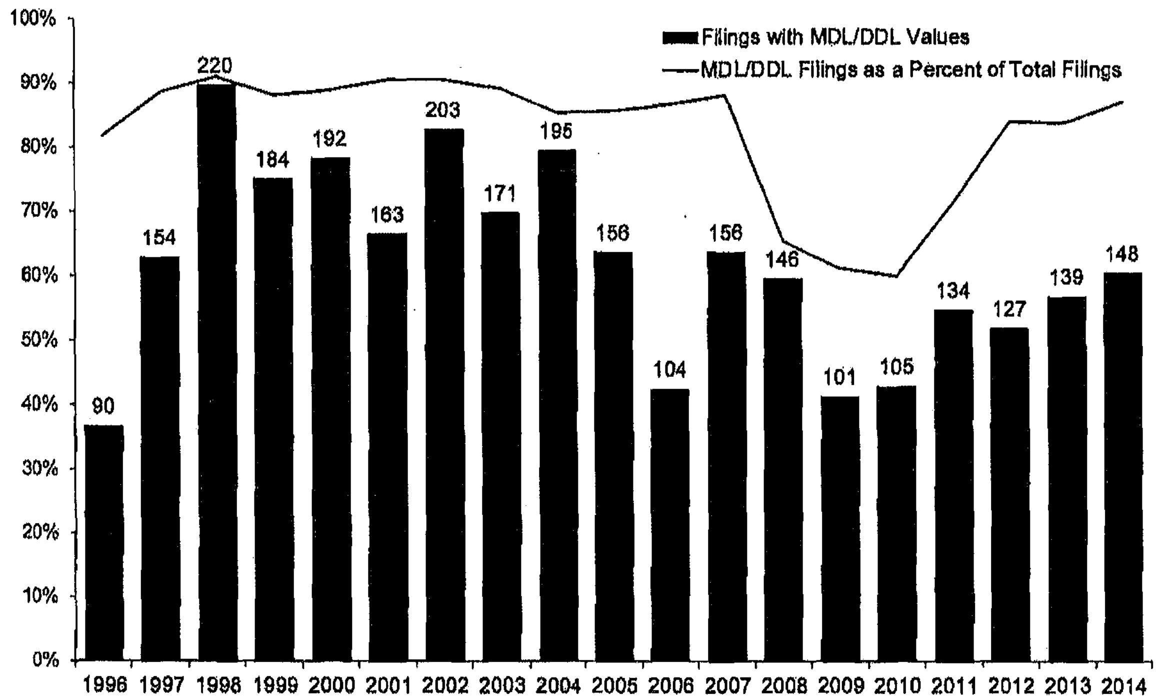
The frequency of filings for which an MDL/DDL value can be calculated changes from year to year depending on trends in class action claims. For example, MDL/DDL *cannot* be calculated for certain M&A filings and filings where the securities at issue are not publicly traded.

KEY FINDINGS

- The percentage of filings for which an MDL/DDL value could be calculated decreased dramatically between 2007 and 2010. This was driven in large part by an increase in filings during the credit crisis that related to non-equity securities (e.g., mortgage-backed securities and other structured products). In recent years, fewer non-equity securities were the subject of litigation so this ratio returned to rates consistent with pre–credit crisis figures.
- In 2014, an MDL/DDL value could be calculated for 87 percent of total filings compared to the historical average of 82 percent from 1996 to 2013. The lowest value was 60 percent, recorded in 2010.
- Among all filings without an MDL/DDL in 2014, 55 percent were M&A class actions.

The decline in DDL and MDL in 2014 was not related to underlying changes in the securities at issue in recent filings.

FIGURE 9: **FILINGS WITH MDL/DDL VALUES**
1996–2014



NEW ANALYSIS: STATUS OF SECURITIES CLASS ACTION FILINGS

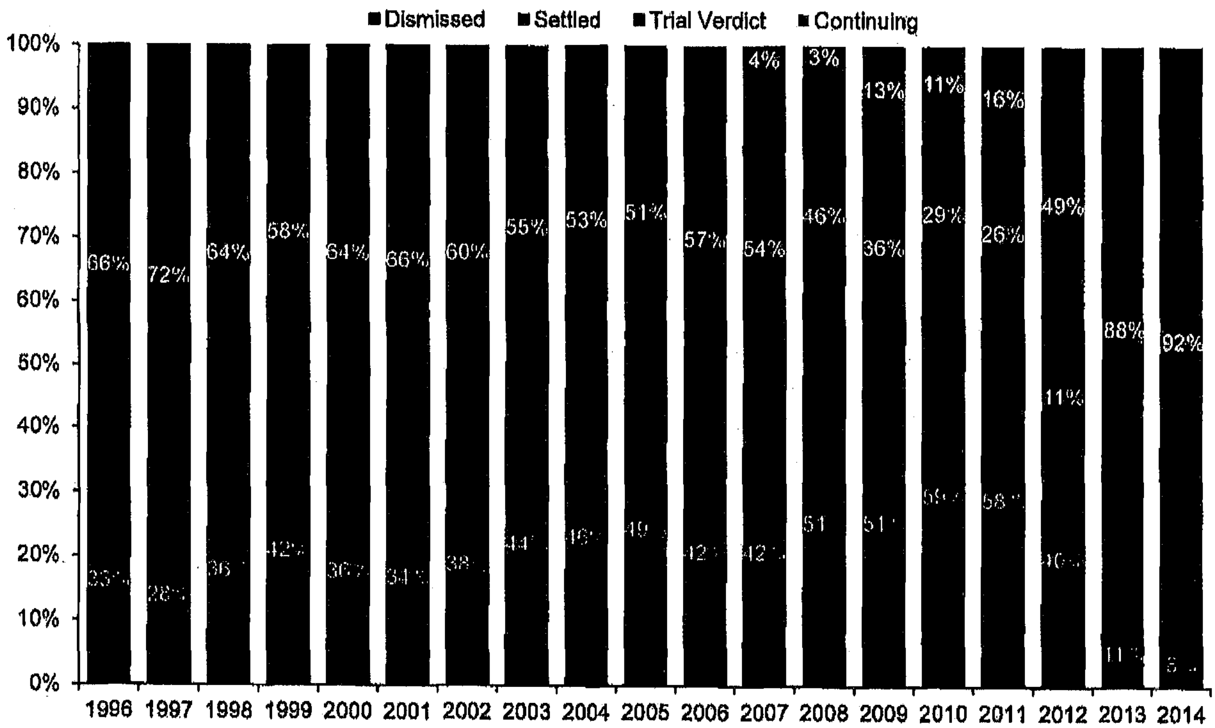
Continuing recent analyses of class action resolutions, this report again examines whether case outcomes have changed over time. This is an extension of analyses initially conducted in 2010 and 2013 that showed dismissals were increasingly common for filings in cohort years after 2003. As each cohort ages, a larger percentage of filings are resolved—with a settlement, dismissal, or trial verdict outcome.

Dismissal rates increased for 2010 and 2011 filing cohorts compared with prior years.

KEY FINDINGS

- Filings from 2012 appear to be following a similar heightened dismissal rate to those observed for filing years 2010 and 2011.
- For filings from 1996 to 2013, 49 percent have settled, 41 percent have been dismissed, and 9 percent are ongoing. Overall, less than 1 percent of filings from 1996 to 2013 reached a trial verdict. The oldest ongoing case, *Halliburton Co. v. Erica P. John Fund*, was filed in 2002 and class certification issues were ruled on by the U.S. Supreme Court in June 2014. The Court remanded the case to the district court for further proceedings.

FIGURE 10: **STATUS OF FILINGS BY YEAR**
1996–2014



Note: Percentages may not add to 100 percent due to rounding.

STATUS OF SECURITIES CLASS ACTION FILINGS *continued*

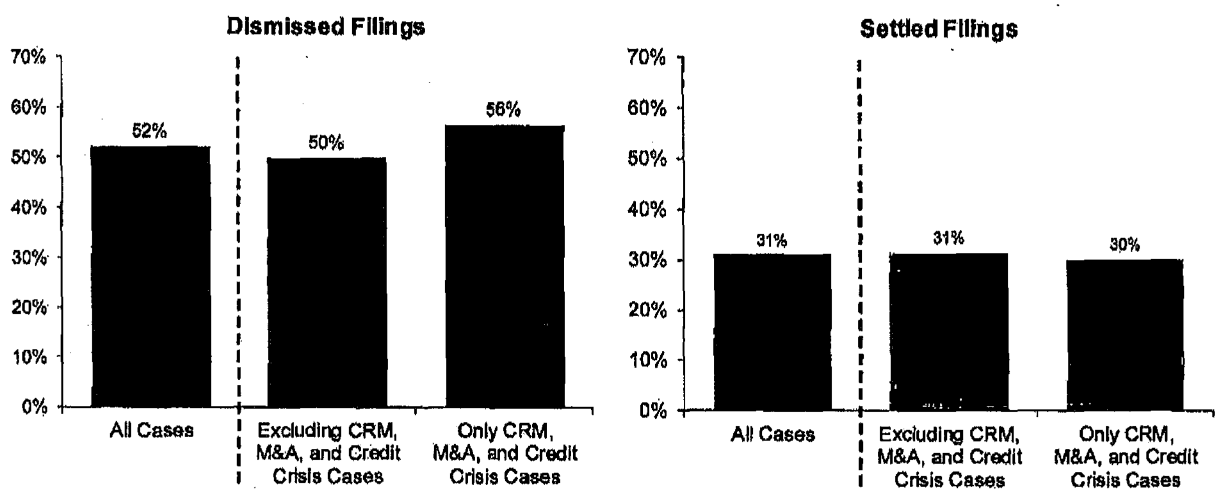
The increase in dismissal rates in recent cohort years may be a function of many factors. The composition of filings may be one explanation; changing legal precedents or philosophies may be another. The findings of this report also indicate that the underlying characteristics of the complaints may also be correlated with filing outcomes.

KEY FINDINGS

- In the aggregate for cohort years 2008 through 2012, CRM, M&A, and credit crisis filings have had higher dismissal rates and slightly lower settlement rates compared with all filings. The aggregate dismissal rate for filings in these years was 52 percent, while the subset of CRM, M&A, and credit crisis cases was 56 percent.
- Statistical tests indicate that M&A filings were more likely to be dismissed and CRM filings were more likely to settle, controlling for other factors.
- The resolution of CRM, M&A, and credit crisis filings has contributed to the increase in dismissal rates, but it is not the only explanation. Other filing characteristics such as how quickly the case was filed, the length of the class period, or the size of the potential claims also appear to be correlated with whether a case settles or is dismissed. Why these characteristics matter is unclear, but they may be indicators of the merits or serve as proxies for other factors that influence filing outcomes.

Recent increases in dismissal rates are not solely explained by the influx of CRM, M&A, and credit crisis–related filings.

FIGURE 11: **SETTLEMENT AND DISMISSAL RATES IN RECENT YEARS**
AGGREGATE RATES FOR FILINGS IN COHORT YEARS 2008–2012



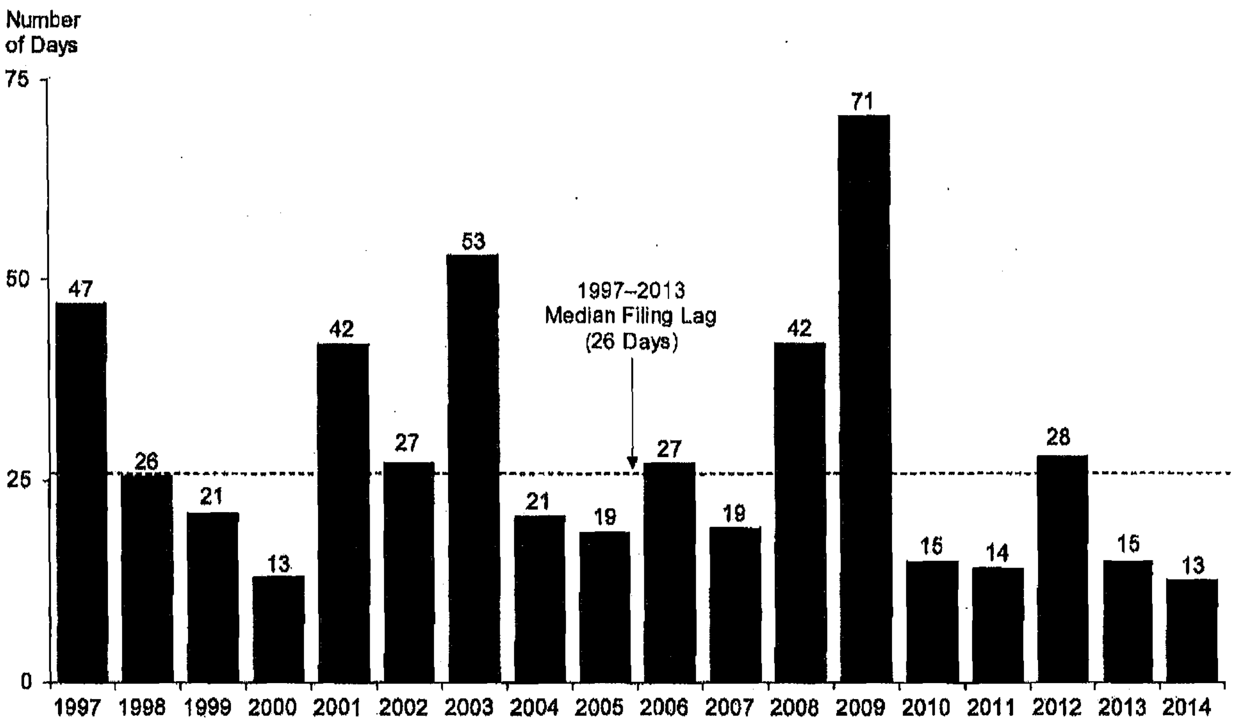
FILING LAG

KEY FINDINGS

- In 2014, the median filing lag between the end of the alleged class period and the filing date of the lawsuit matched the shortest on record, which previously occurred in 2000.
- The median filing lag in 2014 excluding M&A cases was 15 days, two days longer than the median of all cases. M&A cases are normally filed shortly after the class end date.
- Nine percent of class actions were filed more than six months (i.e., 180 days) after the end of the alleged class period—the lowest percentage on record.
- Past reports have examined the implications of "fast filers" (class actions with a filing lag of less than or equal to 60 days) and "slow filers" (those with a filing lag greater than 60 days). Fast filers are more likely to settle earlier in the litigation process and overall were less likely to be dismissed (see Cornerstone Research, <u>*Securities Class Action Filings—2012 Year in Review*</u>, pages 8–9), a finding confirmed by the statistical analyses described on the previous page.

The median filing lag in 2014 of 13 days matched the shortest on record.

FIGURE 12: **ANNUAL MEDIAN LAG BETWEEN CLASS END DATE AND FILING DATE 1997–2014**



FOREIGN FILINGS

Class Action Filings-Foreign (CAF-F) Index™

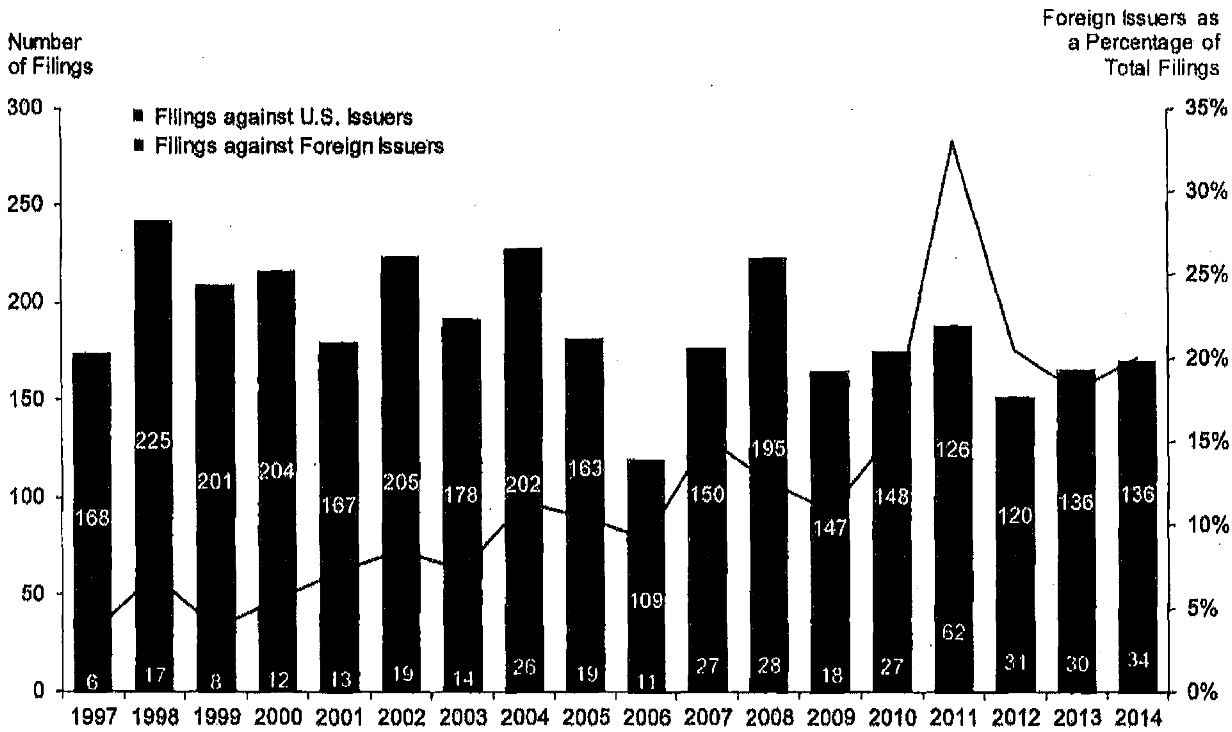
This index tracks the number of filings against foreign issuers (companies headquartered outside the United States) relative to total filings.

KEY FINDINGS

- The number of filings against foreign issuers increased to 34 in 2014, well above the historical average from 1997 to 2013 of 22 filings.
- The pace of foreign filings picked up in the second half of 2014, with the number of such filings more than doubling relative to the first half of the year.
- The percentage of filings against foreign issuers was 18 percent in 2013 and 20 percent in 2014 compared to the 1997–2013 historical average of 11 percent.

Continuing a long-term trend, the percentage of filings against foreign issuers increased.

FIGURE 13: **CLASS ACTION FILINGS-FOREIGN (CAF-F) INDEX™**
ANNUAL NUMBER OF CLASS ACTION FILINGS BY LOCATION OF HEADQUARTERS
1997–2014



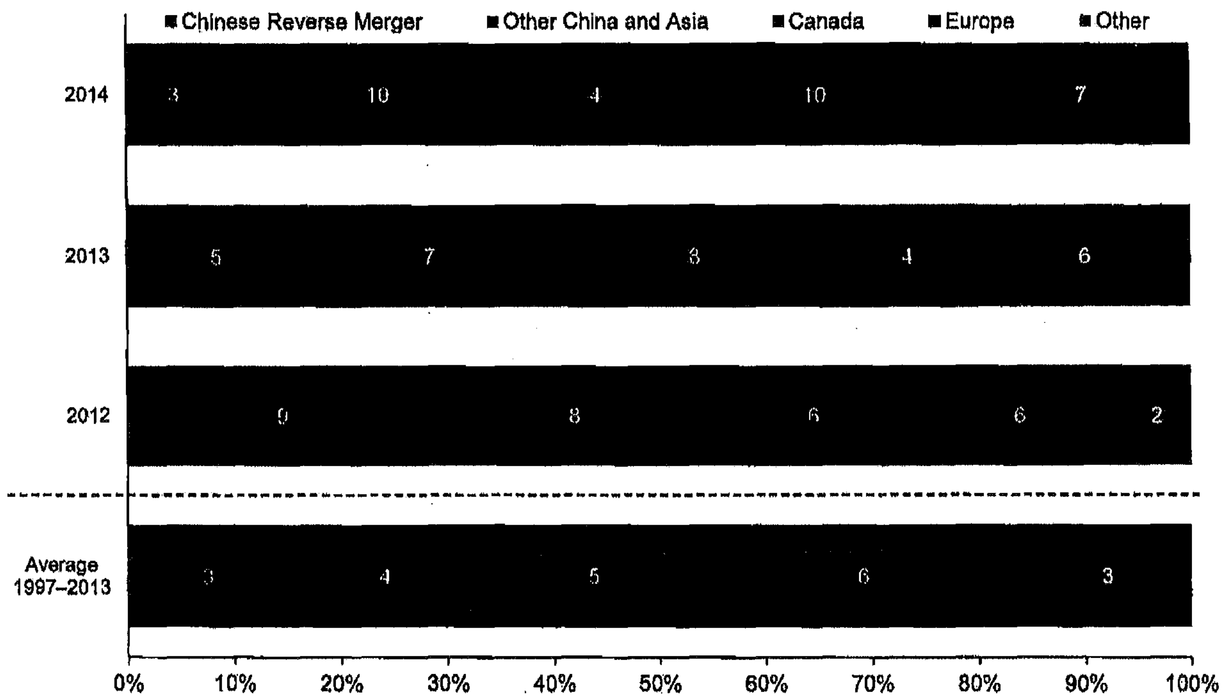
FOREIGN FILINGS *continued*

KEY FINDINGS

- In 2014, filings against European companies increased, reversing a recent decline. Class actions included suits against companies headquartered in France, Germany, Italy, Luxembourg, and the Netherlands, none of which have been the subject of foreign filings since 2011.
- Filings against Canadian firms were the lowest in five years, returning to a level closer to the historical average.
- Other foreign filings included class actions against companies headquartered in Australia, Brazil, Israel, and the Caribbean—specifically, Bermuda, the British Virgin Islands, and the Cayman Islands.

There was a substantial increase in filings against firms headquartered in Europe.

FIGURE 14: **FOREIGN FILINGS BY LOCATION OF HEADQUARTERS**
1997–2014



Note: The Chinese Reverse Merger and Other China and Asia categories include filings for companies headquartered in Hong Kong.

HEAT MAPS: S&P 500 SECURITIES LITIGATION™

The Heat Maps analyze securities class action activity by industry sector. The analysis focuses on companies in the S&P 500 index, which comprises 500 large, publicly traded companies in all major sectors. Starting with the composition of the S&P 500 at the beginning of each year, the Heat Maps examine two questions for each sector:

(1) What percentage of these companies were subject to new securities class actions in federal court during the year?

(2) What percentage of the total market capitalization of these companies was accounted for by companies named in new securities class actions?

The percentage of S&P 500 firms that were targets of a securities class action was the lowest on record.

KEY FINDINGS

- Only one in about 45 companies (2.2 percent) in the S&P 500 at the beginning of 2014 was a defendant in a class action filed during the year, compared with one in about 29 companies (3.4 percent) in 2013. The historical average is approximately one in 17 companies (5.7 percent).
- Only the Consumer Staples and Industrials sectors exhibited above-average activity in 2014 compared with historical averages.

FIGURE 15: **HEAT MAPS OF S&P 500 SECURITIES LITIGATION™ PERCENTAGE OF COMPANIES SUBJECT TO NEW FILINGS**

2000–2014

	Average 2000–2013	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Consumer Discretionary	5.4%	3.3%	2.4%	10.2%	4.6%	3.4%	10.3%	4.4%	5.7%	4.5%	3.8%	5.1%	3.8%	4.9%	6.4%	1.2%
Consumer Staples	3.4%	7.3%	6.9%	2.9%	2.9%	2.7%	6.6%	2.8%	0.0%	2.6%	4.9%	0.0%	2.4%	2.4%	0.0%	5.0%
Energy/Materials	1.5%	2.7%	0.0%	3.1%	1.7%	1.8%	1.7%	0.0%	0.0%	0.0%	1.5%	5.7%	0.0%	2.7%	0.0%	1.3%
Financials	9.8%	4.2%	1.4%	[illegible]	6.6%	[illegible]	7.3%	2.4%	10.3%	[illegible]	13.1%	10.3%	1.2%	3.7%	0.0%	1.2%
Health Care	8.7%	2.6%	7.1%	[illegible]	10.4%	10.6%	10.7%	8.9%	12.7%	13.7%	3.7%	[illegible]	2.0%	3.8%	5.7%	3.6%
Industrials	2.9%	2.8%	0.0%	8.0%	3.0%	5.5%	1.8%	0.0%	5.8%	3.6%	6.9%	0.0%	1.7%	1.6%	0.0%	4.7%
Telecommunications/ Information Tech	6.7%	12.0%	[illegible]	11.0%	5.6%	3.2%	6.7%	8.1%	2.3%	2.5%	1.2%	3.5%	7.1%	3.8%	9.1%	0.0%
Utilities	6.3%	6.0%	7.9%	[illegible]	2.8%	5.7%	3.0%	0.0%	3.1%	3.2%	0.0%	0.0%	5.6%	3.1%	0.0%	3.2%
All S&P 500 Companies	**5.7%**	**5.0%**	**5.6%**	**12.0%**	**6.2%**	**7.2%**	**6.6%**	**3.6%**	**6.4%**	**9.2%**	**4.8%**	**5.4%**	**3.2%**	**3.4%**	**3.4%**	**2.2%**

Legend 0% 0–5% 5–10%

Note:

1. The chart is based on the composition of the S&P 500 as of the last trading day of the previous year.
2. Sectors are based on the Global Industry Classification Standard (GICS). The Energy and Materials sectors and the Telecommunications and Information Technology sectors appear separately but are combined for the purposes of this analysis.
3. Percentage of Companies Subject to New Filings equals the number of companies subject to new securities class action filings in federal courts in each sector divided by the total number of companies in that sector.

HEAT MAPS: S&P 500 SECURITIES LITIGATION *continued*

KEY FINDINGS

- Larger S&P 500 companies have historically been more likely targets of class actions. However, this pattern was reversed in 2014, as the percentage of S&P 500 companies subject to filings was greater than their share of the S&P 500 market capitalization.
- Only 1.3 percent of the S&P 500 market capitalization was subject to new filings in 2014, the lowest on record, compared to the historical average of 10.1 percent. This is the fourth consecutive year with a declining percentage of market capitalization subject to class action filings.
- Consumer Staples was the most active sector in 2014 as a percentage of market capitalization.
- Three of the 10 S&P 500 sectors had no filing activity in 2014: Energy, Information Technology, and Telecommunications.

Larger S&P 500 firms were less likely to be targets of class actions, a reversal from previous years.

FIGURE 16: **HEAT MAPS OF S&P 500 SECURITIES LITIGATION™**
PERCENTAGE OF MARKET CAPITALIZATION SUBJECT TO NEW FILINGS
2000–2014

	Average 2000–2013	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Consumer Discretionary	6.4%	6.5%	1.3%	[illegible]	2.0%	7.8%	5.7%	6.9%	4.4%	7.2%	1.9%	4.9%	4.6%	1.6%	4.4%	2.5%
Consumer Staples	5.9%	[illegible]	6.3%	0.3%	2.3%	0.1%	11.4%	0.8%	0.0%	2.6%	3.9%	0.0%	0.8%	14.0%	0.0%	3.4%
Energy/Materials	2.3%	3.0%	0.0%	1.2%	0.4%	29.7%	1.6%	0.0%	0.0%	0.0%	0.8%	5.5%	0.0%	0.9%	0.0%	0.2%
Financials	[illegible]	3.3%	0.8%	[illegible]	[illegible]	[illegible]	[illegible]	8.2%	[illegible]	[illegible]	[illegible]	[illegible]	6.9%	11.0%	0.0%	0.3%
Health Care	14.9%	11.0%	5.4%	[illegible]	[illegible]	[illegible]	10.1%	[illegible]	[illegible]	[illegible]	1.7%	[illegible]	0.7%	3.8%	4.4%	3.0%
Industrials	6.4%	3.9%	0.0%	13.3%	4.6%	6.8%	5.6%	0.0%	2.2%	[illegible]	[illegible]	0.0%	2.1%	1.2%	0.0%	1.7%
Telecommunications/ Information Tech	10.0%	15.0%	32.6%	9.1%	1.7%	1.2%	10.3%	8.3%	3.4%	1.4%	0.3%	5.9%	13.4%	2.2%	[illegible]	0.0%
Utilities	7.5%	5.6%	[illegible]	[illegible]	4.3%	4.8%	5.6%	0.0%	5.5%	4.0%	0.0%	0.0%	5.8%	6.8%	0.0%	0.7%
All S&P 500 Companies	**10.1%**	**11.1%**	**10.9%**	[illegible]	**8.0%**	[illegible]	**10.7%**	**8.7%**	**5.2%**	[illegible]	**8.6%**	**11.2%**	**6.1%**	**4.9%**	**4.7%**	**1.3%**

Legend 0% 0–5% 5–15% [illegible]

Note:
1. The chart is based on the market capitalizations of the S&P 500 companies as of the last trading day of the previous year. If the market capitalization on the last trading day is not available, the average fourth-quarter market capitalization is used.
2. Sectors are based on the Global Industry Classification Standard (GICS). The Energy and Materials sectors and the Telecommunications and Information Technology sectors appear separately but are combined for the purposes of this analysis.
3. Percentage of Market Capitalization Subject to New Filings equals the total market capitalization of companies subject to new securities class action filings in federal courts in each sector divided by the total market capitalization of all companies in that sector.

MEGA FILINGS

Mega DDL and MDL Filings

This section provides an analysis of large filings, as measured by DDL and MDL, in which mega DDL filings have a disclosure dollar loss (DDL) of at least $5 billion and mega MDL filings have a maximum dollar loss (MDL) of at least $10 billion.

KEY FINDINGS

- For the first time on record, there were zero mega DDL filings.
- There were two mega MDL filings in 2014 with a total MDL of $31 billion. This is the lowest level of mega MDL activity on record.
- The two mega MDL filings—against companies in the oil and gas industry—were filed in the fourth quarter of 2014 and originated in the Second Circuit. Both occurred at a time of falling worldwide crude oil prices.

Mega filings were nearly nonexistent in 2014.

FIGURE 17: **MEGA FILINGS**

	Average 1997–2013	2012	2013	2014
Mega Disclosure Dollar Loss (DDL) Filings[1]				
Mega DDL Filings	5	4	3	0
DDL ($ Billions)	$65	$43	$53	$0
Percentage of Total DDL	58%	44%	51%	0%
Mega Maximum Dollar Loss (MDL) Filings[2]				
Mega MDL Filings	12	10	5	2
MDL ($ Billions)	$432	$224	$132	$31
Percentage of Total MDL	75%	55%	47%	15%

Note:
1. Mega DDL filings have a dollar loss of at least $5 billion.
2. Mega MDL filings have a dollar loss of at least $10 billion.

NEW ANALYSIS: DISTRIBUTION OF MDL VALUES

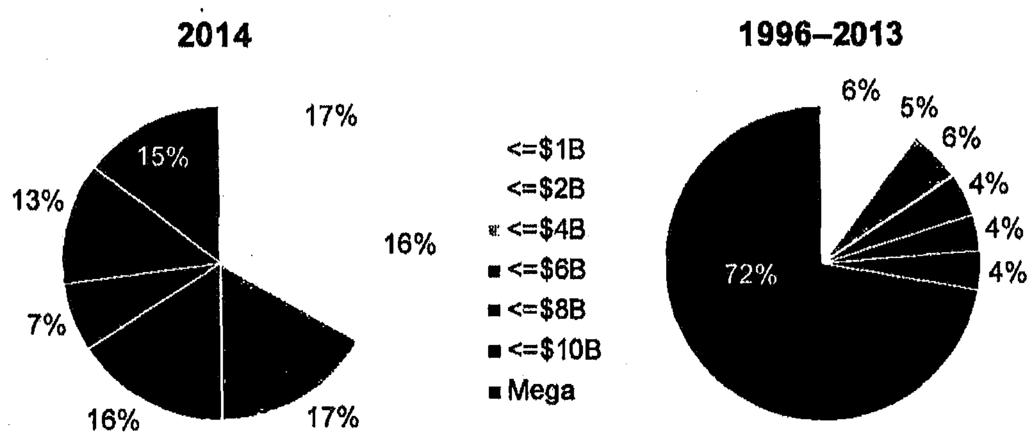
These charts compare the distribution of MDL attributable to filings of a given size in 2014 with the historical distribution of MDL.

KEY FINDINGS

- In 2014, mega MDL filings represented just over 1 percent of the total number of filings and 15 percent of total MDL, well below the historical averages between 1996 and 2013 of 8 percent and 72 percent, respectively.
- In the absence of a meaningful number of mega filings, cases with smaller MDLs accounted for a much larger proportion of total MDL. For example, filings with MDL of less than or equal to $1 billion (the smallest grouping displayed) were 17 percent of MDL in 2014 compared with 6 percent on average.
- Unlike previous years, the percentage of total MDL in 2014 is fairly evenly distributed across all groupings.

Mega MDL filings comprised just 15 percent of total MDL in 2014 compared to the historical average of 72 percent.

FIGURE 18: **DISTRIBUTION OF MDL—PERCENTAGE OF TOTAL MDL ATTRIBUTABLE TO FILINGS IN THE GROUPING**



Note:
1. Values are calculated only for filings with positive MDL data.
2. Size of each slice represents the percentage of total MDL.
3. Percentages may not add to 100 percent due to rounding.

NEW ANALYSIS: DISTRIBUTION OF DDL VALUES

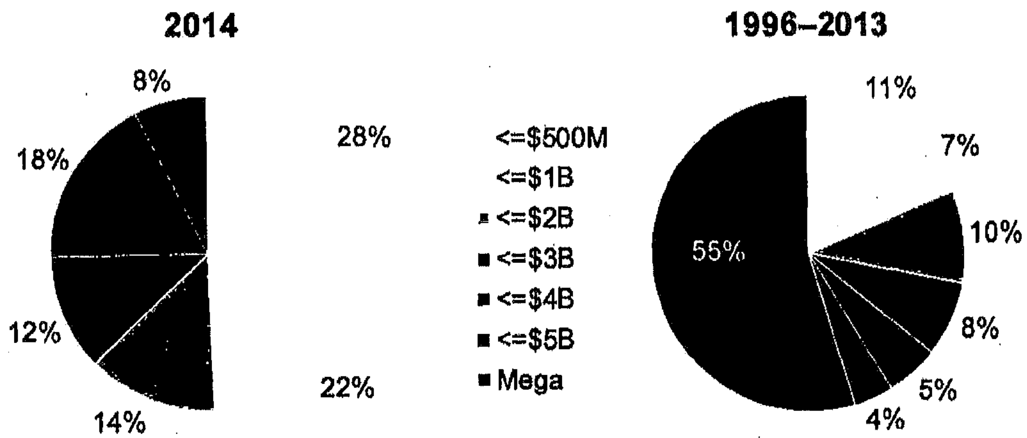
These charts compare the distribution of DDL attributable to filings of a given size in 2014 with the historical distribution of DDL.

KEY FINDINGS

- Historically, mega DDL filings have accounted for 4 percent of total filings and 55 percent of total DDL.
- Given the lack of mega filings, class actions with smaller DDLs (less than or equal to $1 billion) accounted for 50 percent of total DDL in 2014 compared to 18 percent historically.

There were no mega DDL filings in 2014.

FIGURE 19: **DISTRIBUTION OF DDL—PERCENTAGE OF TOTAL DDL ATTRIBUTABLE TO FILINGS IN THE GROUPING**



Note:
1. Values are calculated only for filings with positive DDL data.
2. Size of each slice represents the percentage of total DDL.
3. Percentages may not add to 100 percent due to rounding.

INDUSTRY

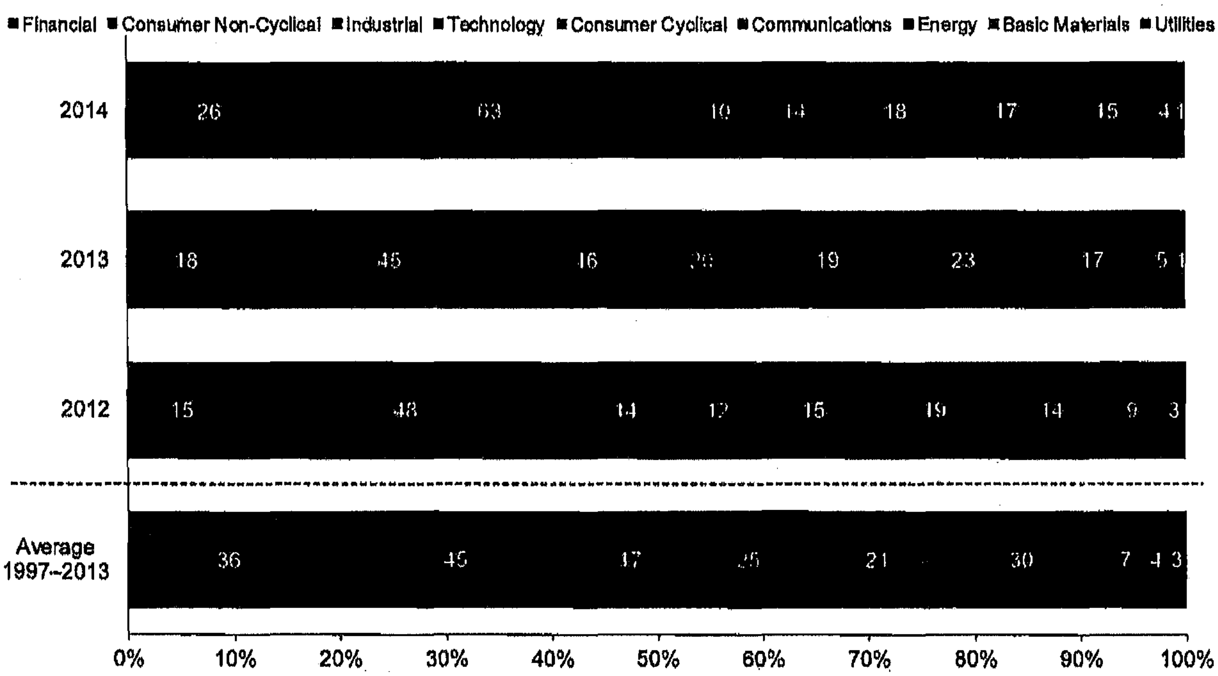
This analysis encompasses all filings, both the large capitalization companies of the S&P 500, shown on the preceding pages, as well as smaller companies.

KEY FINDINGS

- Filings against companies in the Financial sector increased for the third consecutive year, but the number of filings against companies in this sector still remained below the historical average. Likewise, the DDL for filings against Financial sector companies, $7 billion, remained well below the historical average of $20 billion (*see* Appendix 2).
- As oil and gas prices slumped in the fourth quarter of 2014, six class actions were filed against oil and gas companies. These filings represented 40 percent of the total Energy sector filings in 2014.
- Filings against companies in the Communications sector fell to the lowest level since 2010, comprising 10 percent of total filings in 2014.

Class actions against companies in the Consumer Non-Cyclical sector were again the most common filing.

FIGURE 20: **FILINGS BY INDUSTRY**



Note:
1. Filings with missing sector information or infrequently used sectors may be excluded. For more information, see Appendix 2.
2. Sectors are based on the Bloomberg Industry Classification System.

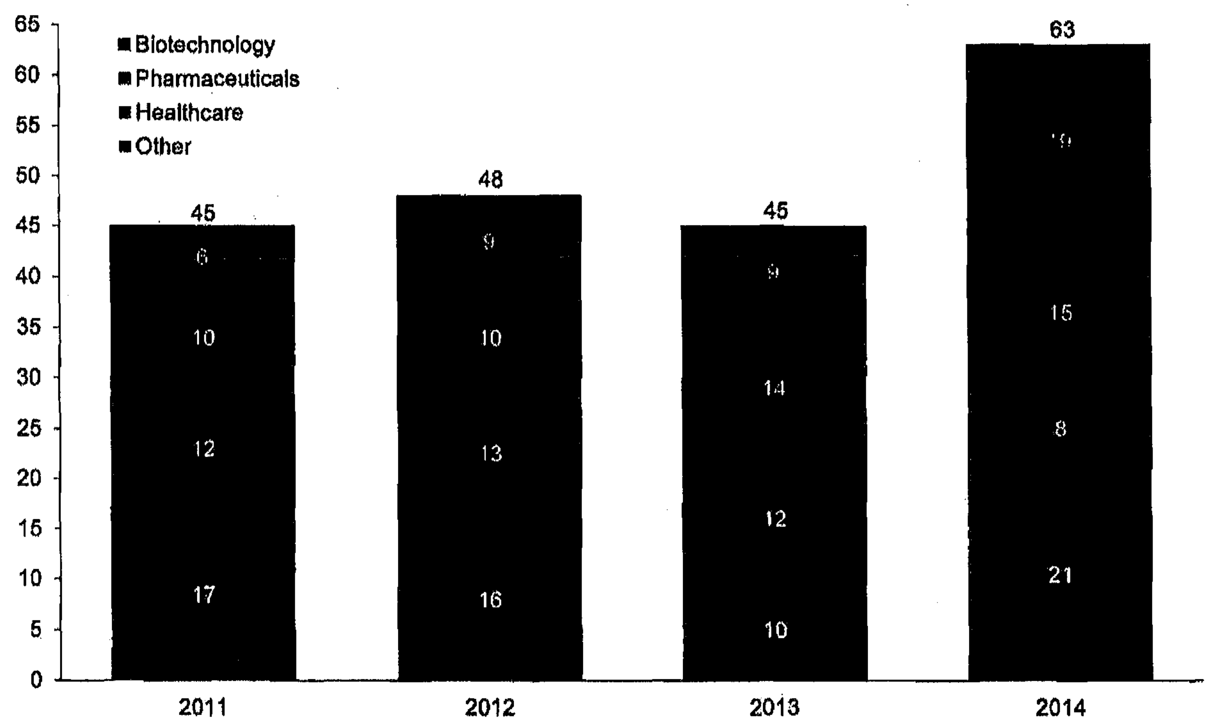
INDUSTRY *continued*

KEY FINDINGS

- Filings in the Consumer Non-Cyclical sector increased by 40 percent, from 45 filings in 2013 to 63 in 2014. This increase was largely fueled by an 111 percent increase in filings against biotechnology firms.
- Filings against biotechnology firms represented 30 percent of total Consumer, Non-Cyclical class actions filed in 2014, triple the historical average as a percentage of filings.
- Filings against pharmaceutical firms increased for the second year in a row.
- Within the Other category, filings against companies in the Commercial Services subsector were at the highest level since 1999.

Class actions against biotech and pharma companies were predominant in the Consumer, Non-Cyclical sector.

FIGURE 21: **FILINGS IN THE CONSUMER, NON-CYCLICAL SECTOR**



Note:
1. Sectors and subsectors are based on the Bloomberg Industry Classification System.
2. The Other category is a grouping primarily encompassing the Agriculture, Beverage, Commercial Services, and Food subsectors.

EXCHANGE

KEY FINDINGS

- In 2014, 82 class actions were filed against NASDAQ-listed companies compared to 75 filings against companies listed on the NYSE.
- The number of filings against NYSE firms represents a 36 percent increase over the number of filings in 2013. Meanwhile, the number of filings against NASDAQ firms decreased by 15 percent.
- The median DDL for filings against NASDAQ companies increased 7 percent in 2014 compared with 2013, whereas the other measures of the typical size of a filing against NYSE and NASDAQ companies decreased. The decline in these other measures is consistent with the lack of mega filings.
- The number of filings against issuers not listed on an exchange was 13, the same as in 2013.

The percentage of filings against firms listed on the NYSE and NASDAQ was close to the historical average.

FIGURE 22: **FILINGS BY EXCHANGE LISTING**

	Average (1997–2013)		2013		2014	
	NYSE/Amex	NASDAQ	NYSE	NASDAQ	NYSE	NASDAQ
Class Action Filings	76	96	55	97	75	82
Disclosure Dollar Loss						
DDL Total ($ Billions)	$89	$35	$41	$63	$26	$0
Average ($ Millions)	$1,358	$396	$815	$755	$408	$404
Median ($ Millions)	$253	$90	$226	$121	$220	$130
Maximum Dollar Loss						
MDL Total ($ Billions)	$424	$204	$170	$108	$130	$80
Average ($ Millions)	$6,395	$2,255	$3,396	$1,300	$2,038	$1,068
Median ($ Millions)	$1,294	$447	$1,005	$531	$780	$393

Note:
1. Average and median numbers are calculated only for filings with MDL and DDL data.
2. NYSE Amex was renamed NYSE MKT in May 2012.

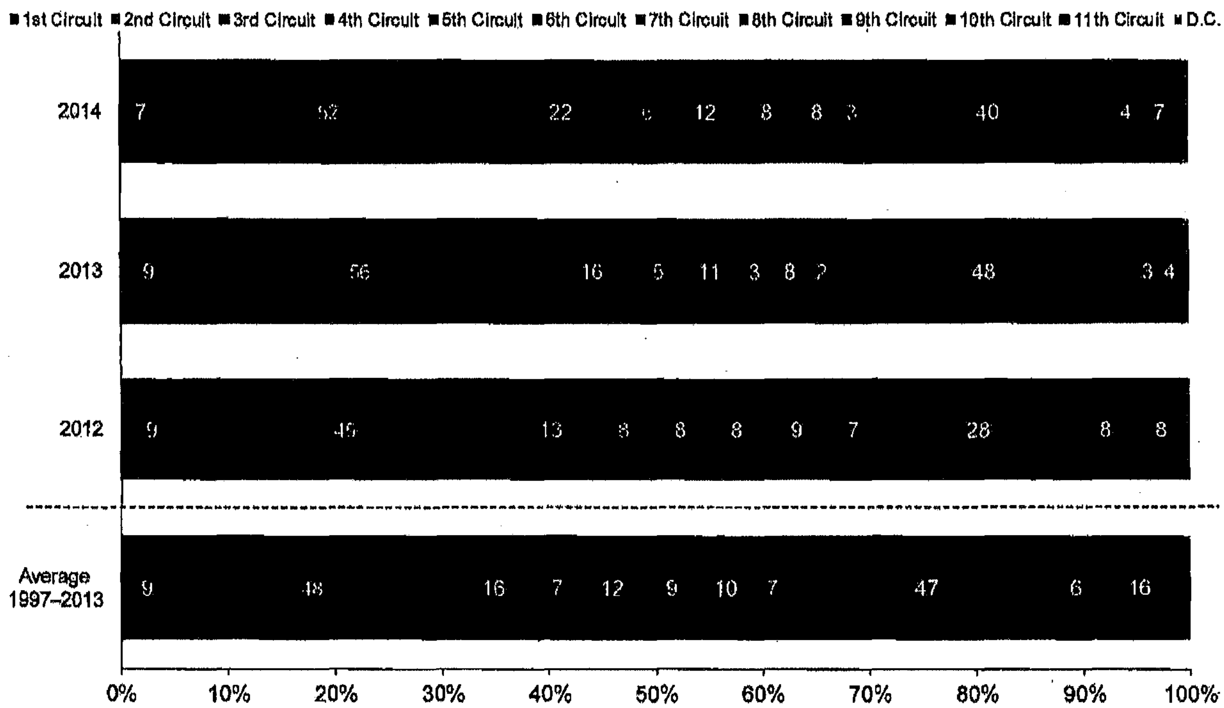
CIRCUIT

KEY FINDINGS

- Filing activity in 2014 in the Second and Ninth Circuits collectively was close to the historical average of 50 percent of filings.
- Filings in the Third Circuit increased to the highest level since 2004, attributable in part to an increase in filings against companies in the biotechnology and pharmaceutical industries.
- DDL and MDL in all circuits were at or below historical averages. Even though both mega DDL filings in 2014 originated in the Second Circuit, the Second Circuit's DDL declined to $24 billion, close to half of the historical average of $42 billion (*see* Appendix 3).

Filing activity in the Second and Ninth Circuits decreased.

FIGURE 23: **FILINGS BY COURT CIRCUIT**



Note: For more information, see Appendix 3.

NEW DEVELOPMENTS

HALLIBURTON CO. V. ERICA P. JOHN FUND

In a highly anticipated ruling, on June 23, 2014, the U.S. Supreme Court issued its opinion in *Halliburton Co. v. Erica P. John Fund* (*Halliburton II*). At issue in this appeal by Halliburton was the fraud-on-the-market presumption established in *Basic Inc. v. Levinson* (1988).

For a typical Rule 10b-5 securities class action with allegations of misrepresentations, *Basic* established that plaintiffs did not need to demonstrate that individual class members relied on any allegedly misleading statements if the market in which the security at issue traded can be shown to be "efficient"—that is, the market price reflected all publicly available information. In those circumstances, any material misrepresentations were deemed to be reflected in the price of the security.

Petitioners asked the Court to overrule or substantially modify *Basic*. They further asked whether defendants may rebut the presumption of reliance, when invoked by plaintiffs, by introducing evidence that the alleged misrepresentations did not distort the market price of the security at issue.

In *Halliburton II*, the Court declined to overturn *Basic*. It did find, however, that defendants could rebut the presumption prior to class certification by showing direct evidence "that the alleged misrepresentations did not actually affect the stock price—that is, that it had no 'price impact.'" It is too early to tell the long-term impact of the Supreme Court's ruling. Clarification regarding the standard of proof of no price impact that courts may require of defendants is but one area of future uncertainty.

GLOSSARY

Chinese reverse merger (CRM) filing is a securities class action against a China-headquartered company listed on a U.S. exchange as a result of a reverse merger with a public shell company. *See* Cornerstone Research, *Investigations and Litigation Related to Chinese Reverse Merger Companies.*

Class Action Filings (CAF) Index™ tracks the number of federal securities class action filings.

Class Action Filings-Foreign (CAF-F) Index™ tracks the number of filings against foreign issuers (companies headquartered outside the United States) relative to total filings.

Disclosure Dollar Loss (DDL) Index™ measures the aggregate DDL for all filings over a period of time. 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. DDL should not be considered an indicator of liability or measure of potential damages. Instead, it estimates the impact of all information revealed during or at the end of the class period, including information unrelated to the litigation.

Filing lag is the time between the end of a class period and the filing of a securities class action.

Heat Maps of S&P 500 Securities Litigation™ analyze securities class action activity by industry sector. The analysis focuses on companies in the Standard & Poor's 500 (S&P 500) index, which comprises 500 large, publicly traded companies in all major sectors. Starting with the composition of the S&P 500 at the beginning of each year, the Heat Maps examine two questions for each sector: (1) What percentage of these companies were subject to new securities class actions in federal court during the year? (2) What percentage of the total market capitalization of these companies was accounted for by companies named in new securities class actions?

Market capitalization losses measure changes to market values of the companies subject to class action filings. Market capitalization losses are tracked for defendant firms during and at the end of class periods. They are calculated for publicly traded common equity securities, closed-ended mutual funds, and exchange-traded funds where data are available. Declines in market capitalization may be driven by market, industry, and/or firm-specific factors. To the extent that the observed losses reflect factors unrelated to the allegations in class action complaints, indices based on class period losses would not be representative of potential defendant exposure in class actions. This is especially relevant in the post-*Dura* securities litigation environment. In April 2005, the U.S. Supreme Court ruled that plaintiffs in a securities class action are required to plead a causal connection between alleged wrongdoing and subsequent shareholder losses. This report tracks market capitalization losses at the end of each class period using DDL, and market capitalization losses during each class period using MDL.

Maximum Dollar Loss (MDL) Index™ measures the aggregate MDL for all filings over a period of time. 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. MDL should not be considered an indicator of liability or measure of potential damages. Instead, it estimates the impact of all information revealed during or at the end of the class period, including information unrelated to the litigation.

GLOSSARY *continued*

Mega filings include mega DDL filings, securities class action filings with a DDL of at least $5 billion; and mega MDL filings, securities class action filings with an MDL of at least $10 billion.

Merger and acquisition (M&A) filing is a securities class action that has Section 14 claims, but no Rule 10b-5, Section 11, or Section 12(2) claims, and involves a merger and acquisition transaction.

Securities Class Action Clearinghouse is an authoritative source of data and analysis on the financial and economic characteristics of federal securities fraud class action litigation, cosponsored by Cornerstone Research and Stanford Law School.

APPENDICES

APPENDIX 1: **FILINGS COMPARISON**

	Average (1997–2013)	2013	2014
Class Action Filings	189	166	170
Disclosure Dollar Loss			
DDL Total ($ Billions)	$124	$104	$57
Average ($ Millions)	$795	$745	$387
Median ($ Millions)	$122	$148	$169
Maximum Dollar Loss			
MDL Total ($ Billions)	$630	$279	$215
Average ($ Millions)	$4,022	$2,004	$1,455
Median ($ Millions)	$646	$532	$532

Note: Average and median numbers are calculated only for filings with MDL and DDL data.

APPENDIX 2: **FILINGS BY INDUSTRY**

(Dollars in Billions)

	Class Action Filings				Disclosure Dollar Loss				Maximum Dollar Loss			
Industry	Average 1997–2013	2012	2013	2014	Average 1997–2013	2012	2013	2014	Average 1997–2013	2012	2013	2014
Financial	36	15	18	26	$20	$23	$1	$7	$121	$99	$2	$22
Consumer Non-Cyclical	45	48	45	63	$36	$25	$20	$21	$127	$57	$56	$53
Industrial	17	14	16	10	$12	$2	$2	$3	$37	$12	$10	$10
Technology	25	12	20	14	$18	$13	$52	$9	$83	$98	$93	$22
Consumer Cyclical	21	15	19	18	$9	$17	$12	$9	$52	$46	$31	$18
Communications	30	19	23	17	$24	$9	$13	$3	$171	$41	$22	$28
Energy	7	14	17	15	$3	$5	$2	$4	$19	$33	$13	$51
Basic Materials	4	9	5	4	$1	$4	$1	$1	$11	$18	$51	$10
Utilities	3	3	1	1	$1	$0	$0	$0	$10	$1	$1	$0
Unknown/Unclassified	1	2	2	2	-	-	-	-	-	-	-	-
Total	189	151	166	170	$124	$97	$104	$57	$630	$404	$279	$215

Note:
1. Numbers may not add due to rounding.
2. Filings with missing sector information or infrequently used sectors may be excluded in prior years.

APPENDICES *continued*

APPENDIX 3: **FILINGS BY COURT CIRCUIT**
(Dollars in Billions)

	Class Action Filings				Disclosure Dollar Loss				Maximum Dollar Loss			
Circuit	Average 1997–2013	2012	2013	2014	Average 1997–2013	2012	2013	2014	Average 1997–2013	2012	2013	2014
1st	9	9	9	7	$8	$1	$39	$3	$22	$4	$46	$5
2nd	48	45	56	52	$42	$42	$31	$24	$230	$166	$137	$86
3rd	16	13	16	22	$17	$0	$3	$4	$62	$9	$8	$10
4th	7	8	5	6	$3	$1	$2	$2	$13	$4	$4	$13
5th	12	8	11	12	$7	$0	$1	$3	$39	$2	$6	$16
6th	9	8	3	8	$7	$14	$0	$5	$29	$23	$1	$15
7th	10	9	8	8	$6	$5	$1	$3	$27	$21	$8	$6
8th	7	7	2	3	$4	$3	$1	$1	$15	$12	$11	$4
9th	47	28	48	40	$21	$24	$20	$9	$153	$132	$51	$41
10th	6	8	3	4	$3	$4	$4	$1	$14	$23	$6	$3
11th	16	8	4	7	$5	$2	$0	$3	$24	$7	$1	$15
D.C.	1	0	1	1	$1	$0	$0	$0	$3	$0	$0	$2
Total	189	151	166	170	$124	$97	$104	$57	$630	$404	$279	$215

Note: Numbers may not add due to rounding.

RESEARCH SAMPLE

- The Stanford Law School Securities Class Action Clearinghouse, in collaboration with Cornerstone Research, has identified 3,898 federal securities class action filings between January 1, 1996, and December 31, 2014 (securities.stanford.edu).

- The sample used in this report is referred to as the "classic filings" sample and excludes IPO allocation, analyst, and mutual fund filings (313, 68, and 25 filings, respectively).

- Multiple filings related to the same allegations against the same defendant(s) are consolidated in the database through a unique record indexed to the first identified complaint.

The authors request that you reference Cornerstone Research and the Stanford Law School Securities Class Action Clearinghouse in any reprint of the information or figures included in this study.

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From: Howson, Patsy [mailto:Patsy.Howson@dlapiper.com]
Sent: Friday, April 10, 2015 4:27 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Keehnel, Stellman; Heaton, Katherine
Subject: Becker v. Community Health Systems, Inc.; Supreme Court No. 90946-6

Attached for filing is the following document:

- Community Health Systems Professional Services Corporation's Supplemental Brief

This brief is being submitted for filing in *Becker v. Community Health Systems, Inc.,* No. 90946-6, on behalf of:

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Thank you.

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