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The Milberg Weiss Prosecution: No Harm, No Foul?

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Perspectives on legislation, regulation and litigation

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AEI LEGAL CENTER
FOR THE PUBLIC INTEREST

AEI *Division of American Enterprise Institute*

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Michael A. Perino

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Preface

For years, academics and reformers have argued that class representatives in securities class actions were not acting as effective principals overseeing the work of their attorneys, their purported agents. The 2006 indictment of the leading plaintiffs' law firm, Milberg Weiss, and many of its most prominent partners and former partners for paying kickbacks to representative plaintiffs, with such sordid details of cash dispensed from a safe in a credenza in David Bershad's office, made these complaints concrete. But even as the name of the Milberg Weiss Bershad & Schulman law firm was successively shortened as each of the living name partners accepted guilty pleas, many sought to argue that the crimes in the indictments were victimless. William Lerach, in the wake of his guilty plea, wrote a series of op-eds bashing corporate CEOs while magnanimously forgiving his own behavior as merely stepping over the line, a technicality.

In this *Briefly*, Professor Michael Perino provides evidence that the Milberg Weiss scheme successfully extracted money that should have gone to their putative clients. Professor Perino's study, using a database of approximately 730 class actions settlements and fee awards, examines the Milberg Weiss indictment in detail, and analyzes whether these kickback payments harmed class members. As settlements grew larger, the fee requests and awards of Milberg Weiss cases grew at a faster rate than non-Milberg cases; even within Milberg cases, settlements of cases subject to the indictment grew at a faster rate than non-indictment cases, suggesting that absent class members were, in fact, harmed by the kickbacks to representative plaintiffs, and that judicial scrutiny alone was insufficient to protect the interests of investors from predatory plaintiffs' attorneys. Professor Perino's findings might even understate the problem, if, as Mr. Lerach claimed in an interview with the *Wall Street Journal*, "everybody was paying plaintiffs" and kickbacks are "industry practice" in securities class actions.

As with all previous publications of the former National Legal Center, and now the American Enterprise Institute Legal Center, this monograph is presented to encourage a greater understanding of an important public

policy issue with a significant effect on the law and its processes. The views expressed in this monograph are those of the author.

Theodore H. Frank
Director
AEI Legal Center for the Public Interest

I. Introduction[1]

In the late 1990s, the lawyers at Milberg Weiss Bershad Hynes & Lerach were the undisputed kings of securities fraud class actions. Melvyn Weiss, the dean of the securities class action bar and a co-founder of the firm, ran its New York office. Bill Lerach, frequently described as the most hated man in Silicon Valley because of his penchant for suing high technology issuers, ruled its west coast operations. To say that the validity of the firm's business was a matter of some contention, vastly understates matters. Although some view securities class actions as a necessary supplement to under-resourced government enforcement authorities, others see them as little more than legalized extortion aimed at wringing settlements out of innocent companies suffering temporary market setbacks.

Whatever one's view of the utility of securities class actions, Milberg Weiss is clearly good at what it does. The firm boasts that it has recovered "over $45 billion on behalf of consumers and investors."[2] Because it handles cases on a contingency basis, the firm took a hefty chunk of those recoveries for itself. In the period 1988-1998, its profits were $670 million.[3] From 1983 through 2005, Weiss' share of the firm's profits was nearly $210 million.[4]

Even significant changes in the laws governing class actions apparently could not slow the firm down. When Congress passed the Private Securities Litigation Reform Act in 1995 (PSLRA) to curb perceived class action abuses, many saw it as a thinly disguised "anti-Milberg Weiss" law. If it was, it appeared, at least at first, to be a wildly unsuccessful one because

[1] The author would like to thank Bernie Black, Joe Grundfest, Jon Klick, Larry Ribstein, and participants at a workshop at the University of Texas School of Law for helpful comments and suggestions. I would also like to thank Barbara Traub, Head of Reference Services at St. John's Rittenberg Law Library, for the enormous help she gave me in obtaining court records used to compile the dataset. Two St. John's law students, Lauren Buonome and Patrick McHale, provided additional excellent research assistance. All remaining errors are my own.

[2] http://www.milbergweissjustice.com/thecase_public.php.

[3] Karen Donovan, *Milberg Weiss' $50M Mistake: The Inside Story of Why Jurors Didn't Buy the Firm's Testimony*, Nat'l L.J., Apr. 26, 1999, § A at 1.

[4] *See* United States v. Milberg Weiss LLP, No. CR 05-587(D), Indictment by grand jury, (C.D.Cal., Oct. 2006), ¶ 2 (hereinafter "Indictment").

Milberg Weiss' market share actually increased after passage of the PSLRA.[5] In 2004, Cornerstone Research, an economics consulting firm, found that Milberg Weiss was lead or co-lead counsel in over 50% of the post-PSLRA cases settled through the end of 2003. The next leading firm had less than a 10% market share.[6] The pugnacious Lerach's response was true to form; "Hell, maybe I should thank them—we are making more money than ever."[7]

Despite the bravado, all was not well at the firm. In 1999, a jury found it liable for malicious prosecution after it attempted to discredit a defense-oriented economics consulting firm by naming it as a defendant in the high profile case against Charles Keating and Lincoln Savings and Loan. Milberg Weiss settled the case for $50 million before the jury could decide on punitive damages.[8] Then in 2004, after years of increasing acrimony between Weiss and Lerach, the firm's east and west coast operations split. Lerach took the San Diego office and renamed it Lerach Coughlin Stoia & Robbins. Weiss took everything else and it became Milberg Weiss Bershad & Schulman.[9]

The biggest blow to the firm came in 2006 when the new Milberg Weiss firm and two of its partners, David Bershad and Steven Schulman, were indicted by a federal grand jury in California for allegedly paying three plaintiffs more than $11 million in illegal kickbacks in cases spanning a 25-year period. In a superseding indictment, the government also brought charges against both Weiss and Lerach. The indictments seemingly confirmed rumors and allegations that had existed for years—that plaintiffs' lawyers employed teams of "professional plaintiffs" who owned small stakes in likely litigation targets and who were standing ready, willing, and able to

[5] Joseph A. Grundfest & Michael A. Perino, *Securities Litigation Reform: The First Year's Experience (A Statistical and Legal Analysis of Class Action Securities Fraud Litigation Under the Private Securities Litigation Reform Act of 1995*) (John M. Olin Program in Law and Economics Working Paper Series, Stanford Law School, Working Paper No. 140, February 1997).

[6] Cornerstone Research, Post-Reform Act Securities Lawsuits: Settlements Reported Through December 2003 14 (2004).

[7] Joseph C. Goulden, The Money Lawyers 296 (New York: St. Martin's Press 2006). Somewhat more colorfully, Lerach also bragged: "Just like the old saying puts it, if you shoot at the f***ing king, you damned well better hit him. Those f***ers took their best shot, and I'm still around." *Id*.

[8] Angela Wissman, *Lawyers Behaving Badly*, Illinois Legal Times, May 1999, at 1.

[9] Timothy L. O'Brien, *Behind the Breakup of the Kings of Tort*, N.Y. Times, July 11, 2004, § 3, at 1.

serve as the necessary aggrieved investor in exchange for a piece of the action.

Any indictment of a major law firm would be big news, but this one read like a John Grisham novel. Bershad kept a safe full of cash in his office credenza that he used to pay-off plaintiffs. One of the plaintiffs, Dr. Steven Cooperman, was hardly the kind of innocent small investor that Milberg Weiss often claimed to protect. He had been a high profile Beverly Hills eye surgeon forced to retire from practice when medical authorities accused him of forging a patient's signature on a consent form and convincing a legally blind woman to sign forms she did not understand. Cooperman was the first witness to provide evidence against Milberg Weiss. Why was he cooperating? He had faked the theft of a Monet and Picasso from his art collection and was trying to wrangle a lighter sentence after being convicted for insurance fraud.[10]

Milberg Weiss struggled in the wake of the indictment. Numerous lawyers left the firm,[11] some judges refused to appoint it as lead counsel or removed it as lead counsel in cases it was already litigating,[12] institutional clients it had managed to attract deserted it,[13] and the firm filed only a handful of new cases.[14] While the firm was ranked first among class action firms based on the dollar value of settlements obtained in 2007, $3.2 billion of its $3.8 billion total came from just one action against Tyco

[10] Peter Elkind, *The Fall of Milberg Weiss*, Fortune, Nov. 13, 2006, at 154.

[11] *See* Julie Creswell, *Partner at Law Firm Resigns to Focus on Criminal Charges Against Him*, N.Y. Times, Dec. 9, 2006, § C at 3; Martha Neil, *Milberg Weiss on the Hot Seat: Should Law Firms Ever Be Indicted?*, 92 A.B.A. Journal, Dec. 2006, at 34.

[12] *See In re* Chiron Corp. Sec. Litig., 2007 U.S. Dist. LEXIS, 91140 (N.D. Cal. 2007) (raising concerns about adequacy of disclosures related to indictment in connection with proposed settlement); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 466 F. Supp. 2d 364, 370 (D. Me. 2006) (granting motion to remove Milberg Weiss as lead counsel); Nowak v. Ford Motor Co., 240 F.R.D. 355, 364 (D. Mich. 2006) (refusing to appoint Milberg Weiss as lead counsel); *In re* Medtronic, Inc., 434 F. Supp. 2d 729, 732 (D. Minn. 2006) (removing Milberg Weiss from plaintiffs' steering committee).

[13] *See* Julie Creswell, *Partner at Law Firm Resigns to Focus on Criminal Charges Against Him*, N.Y. Times, Dec. 9, 2006, § C at 3; Cindy Chang, *Law Firm and 4 Figures in Payment Case Enter Pleas*, N.Y. Times, July 18, 2006, § C at 3; Nathan Koppel and Peter Lattman, *Politics & Economics: Milberg Weiss Partners, Clients Defect as Firm Woes Multiply*, Wall St. J., June 3, 2006, § A at 4.

[14] *See* Nathan Koppel, *At Milberg Weiss, A Move to Stanch Loss of Top Talent—Big Class-Action Law Firm Offers Retention Incentives; Some Salaries May Double*, Wall St. J., Sept. 9, 2006, § B at 1; Martha Neil, *Milberg Weiss on the Hot Seat: Should Law Firms Ever Be Indicted?*, 92 A.B.A. Journal, Dec. 2006, at 34. A search of a leading website reporting securities class action activity shows only three cases filed since the indictment in which Milberg Weiss is lead or co-lead counsel.

International, Inc., which was brought in 2002. Ironically, former class members in Milberg Weiss cases have now brought their own RICO class action against the firm claiming they were defrauded by the kickback scheme.[15]

For a brief period the firm and its two indicted partners presented a united defense, but in July 2007 Bershad pleaded guilty, with Schulman quickly following in September 2007.[16] Lerach recently resigned from his firm, pleaded guilty to a single conspiracy count, and was sentenced to two years in prison and $8 million in fines and penalties.[17] Weiss is the latest Milberg Weiss partner to plead guilty. He faces a sentence of 18 to 33 months, has agreed to forfeit $9.75 million in ill-gotten gains, and to pay a fine of $250,000.[18]

The Milberg Weiss prosecution has been controversial. Many on both ends of the political spectrum complain that the Justice Department's decision to indict the law firm rather than just the individual partners responsible for paying the kickbacks was a repeat of the mistake it made indicting Arthur Andersen for its role in Enron.[19] That decision ultimately led to the accounting firm's demise, despite the fact that the Supreme Court overturned the conviction.[20] Some charge that the entire investigation was a politically motivated attempt by Republicans to kill class action lawsuits on behalf of their corporate constituents.[21] Others claim that it is

[15] *Milberg Weiss hit with Rico suit for payments*, Nat'l L.J., Aug. 6, 2007, at 3.

[16] Barry Meier, *Top Class-Action Lawyer Faces Federal Charges*, N.Y. Times, Sept. 21, 2007, § C at 1.

[17] *See* United States v. William S. Lerach, No. CR 07-964, Plea Agreement, (C.D.Cal., Sept. 2007), ¶ 3; Peter Lattman, *Closing Argument: Mr. Lerach Mulls Life Behind Bars*, Wall St. J., Feb. 12, 2008, § A at 1; Nathan Koppel, *Milberg Figure Lerach Retires Amid Plea Talks*, Wall St. J., Aug. 29, 2007, § B at 2.

[18] Nathan Koppel, *Class-Action King Weiss to Plead Guilty to Conspiracy*, Wall St. J., Mar. 21, 2008, § A at 4.

[19] *See* Press Release, U.S. Chamber of Commerce, Chamber Responds to Indictment of Milberg Weiss Law Firm (May 18, 2006), http://www.uschamber.com/press/releases/2006/may/06-85.htm.; Walter Olson, *Inside Milberg's Cresdenza* Wall St. J., May 22, 2006, http://www.manhattan-institute.org/html/_wsj-inside_milbergs_credenza.htm, John R. Wilke, *U.S. Pushes Board Investigation into Milberg Weiss Law Firm*, Wall St. J., June 27, 2005, § A at 1.

[20] Arthur Andersen, LLP v. United States, 544 U.S. 696 (2005).

[21] Julie Creswell, *4 From Congress Defend Indicted Law Firm*, N.Y. Times, June 12, 2006, § C at 10; Charles B. Rangel, Carolyn McCarthy, Gary Ackerman and Robert Wexler, Statement on the Indictment of Milberg Weiss Bershad & Schulman ("The unprecedented recent indictment of Milberg Weiss Bershad & Schulman is a very thinly veiled attempt by the Bush Administration to accomplish by bullying and intimidation what it has not been able to do by law—to end class-action lawsuits, one of the few tools remaining to safeguard the American consumer."). It is worth noting that three of the four authors of this letter were recipients of Milberg Weiss campaign contributions and portions of the letter were lifted directly from a Milberg Weiss press kit. Mike McIntire, *Accused Law Firm Keeps Giving to Democrats*, N.Y. Times, Oct. 18, 2007, § A at 1.

emblematic of federal prosecutorial over-reaching because it turns "misdemeanor violations of state law and non-criminal violations of ethics laws into federal felonies."[22]

This paper analyzes an empirical question that lies at the heart of this debate over whether the government should have pursued its prosecution. The government justifies the case in part by arguing that the kickback scheme is more than just an ethical lapse. It alleges that kickbacks harmed class members because they resulted in excessive legal fees. For the government, every dollar Milberg Weiss paid in kickbacks was a dollar that should have gone to the absent class members. Milberg Weiss, by contrast, contends that if paying kickbacks was a crime, it was a victimless one because any payments that went to representative plaintiffs did not harm the class members the firm represented. Lerach has said quite explicitly that, "The clients that we represented, cared about and fought for were not harmed by the wrongful conduct—it's important to me that people understand that."[23]

On its face, this contention seems difficult to accept. Common sense, after all, would suggest some harm should flow from paying kickbacks. Not so says the firm. The firm reasons that because the payments came out of Milberg Weiss' own legal fees, this was money that was never going to class members in the first place. The money came, in other words, not from the class' pockets, but from Milberg Weiss' own. What is more, the firm argues, because the plaintiffs are alleged to have received a percentage of the fees that Milberg Weiss collected and because fees generally rise with the size of the recovery,[24] the representative plaintiffs had an incentive to

[22] Bruce H. Kobayashi and Larry E. Ribstein, *The Hypocrisy of the Milberg Indictment: The Need for a Coherent Framework on Paying for Cooperation in Litigation*, 2 J. Bus. & Tech. L. 369, 371 (2007). For additional commentary, see also Theresa A. Gabaldon, *Milberg Weiss: Of Studied Indifference and Dying of Shame*, 2 J. Bus. & Tech. L. 207 (2007); Robert W. Hillman, *Whatever Happened to the Market for Partners' Desks? The Milberg Indictment as an Inquiry into Accountability*, 2 J. Bus. & Tech. L. 415 (2007).

[23] *'I Was Guilty:' Iconic Plaintiffs Lawyer William Lerach Looks Back on his Past and Considers what Lies Ahead*, Wall. St. J., Feb. 12, 2008, http://online.wsj.com/article/SB120275552784659491.html?mod=djemITP.

[24] *See* Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Stud. 27, 52 (2004).

maximize the recovery for the class. Indeed, Milberg Weiss even argues that class members may in fact have benefited from the kickbacks to the extent that they led to higher settlement amounts. And, Milberg Weiss adds, it could not have obtained excessive fees even if it wanted to because the judges who ultimately must approve fee awards would have cut back any fee request that was too high.

In short, the government contends that its prosecution is justified because class members suffered a tangible economic harm from the kickback scheme while Milberg Weiss claims that the case is a colossal waste of prosecutorial resources because no class member was injured by payment of these kickbacks. This paper evaluates empirically these competing claims by analyzing a unique database of over 700 securities class action settlements and fee awards.

The paper first examines Milberg Weiss' claim that representative plaintiffs receiving kickback payments have an incentive to maximize recoveries because they receive a portion of the firms' attorneys' fees. The paper starts by evaluating theoretically the precise incentives that kickbacks might create. The impact of incentive payments to representative plaintiffs is not unambiguously harmful. Nonetheless, the plaintiffs in these cases likely held only a few shares in the defendant companies and thus likely realized only a small benefit from increases in settlement size. Under these conditions, the paper shows that a rational plaintiff attempting to maximize its return might pursue a strategy of allowing the lawyer to charge excessive fees in order to maximize the size of the kickback rather than attempting to hold out for a higher settlement.[25]

The paper then empirically tests whether there is any correlation between being named in the indictment and settlement size. Using a linear regression model, the paper finds no statistically significant relationship between the *Indictment* variable and overall settlement size.[26] An alternative way to measure lawsuit success is to measure not the absolute size of the settlement but rather how much of the potential damages in the case the lawyer was able to recover. Here too, there is no statistically significant correlation between this ratio and the *Indictment* variable. In other words, all else being equal recoveries in the indictment cases are statistically indistinguishable from recoveries in the non-indictment cases. Whatever their incentives may have been, there is no evidence that the representative plaintiffs in these cases were in fact able to increase settlement values.

[25] *See* Section III, *infra*.

[26] *See* Section V, *infra*.

The paper next examines fee requests. Simple means comparisons show three significant results. First, average fee requests in the indictment cases (31.83%) were significantly higher than average fee requests in the non-indictment cases (29.29%). Second, Milberg Weiss' average fee requests (30.02%) were significantly higher than the fee requests of other plaintiffs' law firms (28.82%). Third, within the subset of Milberg Weiss cases, the firm on average asked for significantly higher fees in the indictment cases (31.83%) than in the non-indictment cases (29.83%).

Using linear regression analysis, the paper finds evidence that, all else being equal, Milberg Weiss asks for fees that are on average about 5% higher than the requests of other law firms, although in most models the correlation does not meet conventional levels of statistical significance. The more noteworthy finding is that the impact of the *Indictment* variable is not uniform across cases but instead varies with the size of the settlement. Because fees are awarded on a percentage basis, fee requests generally increase as settlement size increases. What is notable about the indictment cases is that this rate of increase is higher than in the non-indictment cases. In most models, this finding is significant at the traditional levels used in social science research. As the cases in the indictment grew larger, on average Milberg Weiss asked for an increasingly greater share of the settlement. More specifically, on average for each 1% increase in settlement, the fee requests in the indictment cases were 0.08% larger than the fee requests in the non-indictment cases.[27] This finding is consistent with the government's contention that the kickbacks led to excessive fee requests.

Milberg Weiss, of course, argues that the court should protect the class from excessive fee requests, so the paper next tests the fees courts actually awarded. Here, although fees are indeed a bit lower than requests, the over-

[27] It is possible that relying solely on cases alleged in the indictment may create a self-selection bias depending on the criteria the government used to select cases for inclusion. For example, the government may have chosen to list in the indictment only those cases with what it determined were low settlements. To address this possibility, the analysis used an alternative indicator variable for cases with repeat, professional plaintiffs rather than cases alleged in the indictment. The results are substantially similar regardless of which variable is used, which suggests that self-selection may not be a significant problem.

all pattern is otherwise identical. Average fees in the indictment cases (29.57%) were significantly higher than in the non-indictment cases (26.4%). Milberg Weiss' fee awards (27.05%) were significantly higher than the fee awarded to other firms (26.09%). And, within the subset of Milberg Weiss cases, average awards were higher in the indictment cases (29.57%) versus the non-indictment cases (26.76%).

The results of the regression analysis of fee awards likewise mirror those of fee requests. There is some evidence that, all else equal, cases in which Milberg Weiss was lead counsel have fee awards that are on average between 4% and 5% higher than the awards in cases in which other firms serve in that role. As with fee requests, there is evidence that the effect of the *Indictment* variable was not constant across cases but instead had a greater impact as settlement size increased. On average, for each 1% increase in the size of the settlement, attorneys' fees were 0.10% higher in the indictment cases than in the non-indictment cases. This finding is consistent with the government's contention that Milberg Weiss received a greater share of the settlement in the indictment cases, which would constitute a real economic harm to the class members who therefore had a lower net recovery.[28]

The finding that fees were in fact higher in the indictment cases is inconsistent with Milberg Weiss' contention that judges act as effective fee monitors. To further evaluate that claim, the paper examines the frequency with which judges reduce fee requests. It finds that in more than half of the cases studied, lawyers received the exact fee they requested. There is no statistically significant difference between the indictment and non-indictment cases. On average in both subsets of cases, plaintiffs' lawyers received approximately 90% of their requested fee. Thus, there is little evidence that *ex post* judicial monitoring alleviated any harms associated with kickbacks.

The remainder of this paper is organized into five sections. Section II provides a brief overview of securities class actions and discusses the long-held belief that lies at the heart of the indictment—that lawyers recruited so-called "professional plaintiffs" who received payments in exchange for their willingness to serve as the figurehead for the litigation. Section III discusses the details of the indictment and evaluates theoretically Milberg

[28] As with fee requests, when an indicator variable for repeat, professional plaintiffs was used in lieu of an indicator variable for indictment, the results were substantially similar.

Weiss' claim that kickbacks did not harm class members. The section then develops several testable hypotheses to evaluate whether the payment of kickbacks in the indictment cases in fact harmed absent class members. Section IV describes how the dataset used in the analysis was constructed and specifies how the variables were defined. Section V contains the results of the empirical analysis. Section VI contains brief concluding remarks.

II. Securities Class Actions and "Professional Plaintiffs"

Securities class actions are a big business. From 1991 through 2006, on average about 235 companies per year were sued in securities class actions.[29] While the number of issuers sued fluctuates from year to year, NERA Economic Consulting estimates that "the average public corporation faces a 7.9% probability that it will face at least one shareholder class action lawsuit over a five-year period."[30] To be sure, the number of issuers sued in a given year is small compared to overall annual federal civil filing rates, which average over 180,000 for the same period.[31] But, the dollar amounts involved in these cases are substantial. According to Cornerstone Research from 1996 through 2007, total securities class action settlements were an inflation-adjusted $52 billion.[32]

How lucrative are these cases for plaintiffs' attorneys? The attorneys invariably handle these cases on a contingency basis—the court awards them a percentage of the total settlement. One can get a sense of plaintiffs' lawyers gross revenues by looking at the fee awards in the sample of cases analyzed here. As shown in Figure 1, in the sample of 700 cases in which both settlement and fee data are available, court-approved settlements totaled almost $38.5 billion (in constant 2005 dollars). The plaintiffs' attorneys' take in those cases was approximately $5.33 billion, about 13.8% of the total. Simply extrapolating this percentage to the $52 billion in settlements since 1996 implies that plaintiffs' lawyers' were awarded fees of approximately $7.2 billion in those cases.

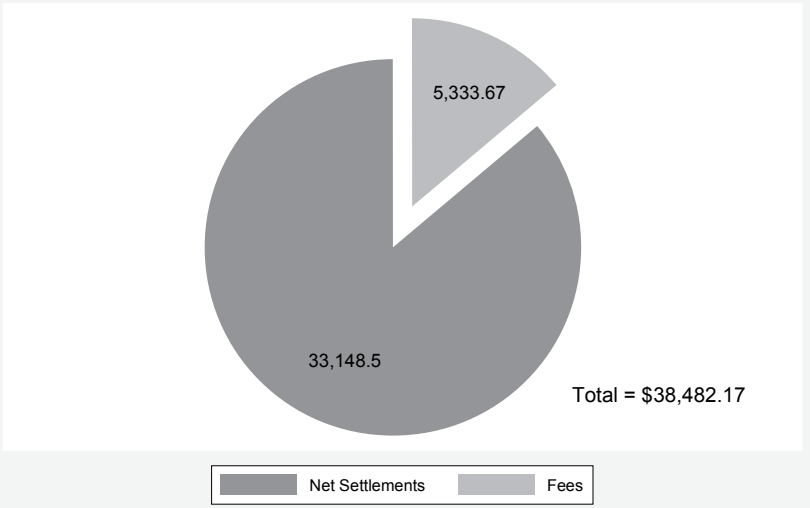
[29] *See* NERA Economic Consulting, Recent Trends in Shareholder Class Action Litigation: Filings Plummet, Settlements Soar 2 (2007) (hereinafter "Recent Trends"). There is also evidence that the rate of class action filings is again on the rise. *See* NERA Economic Consulting, Recent Trends in Shareholder Class Action Litigation: Filings Stay Low and Average Settlements Stay High—But Are These Trends Reversing? (2007).

[30] Recent Trends, *supra* note 29, at 3.

[31] This figure is calculated using data compiled by the Administrative Office of the U.S. Courts. *See* Annual Report of the Director: Judicial Business of the United States Courts, http://www.uscourts.gov/library/statisticalreports.html. In calculating total federal civil filings, social security petitions and prisoner filings were excluded.

[32] Cornerstone Research, Securities Class Action Settlements: 2007 Review and Analysis 2 (2008).

Figure 1: Net Settlements and Fees in Sampled Cases



Note: Net Settlements are settlements minus attorneys' fees for cases with complete data. All figures are in constant 2005 millions of dollars.

This profitable industry was born in the mid-1960s with the confluence of three legal changes. Much of this litigation is premised on Rule 10b-5, a broad anti-fraud rule the SEC originally promulgated in 1942. Initially, there had been some doubt about whether Rule 10b-5 applied to purchases or sales made through securities exchanges,[33] but in 1961, the SEC clarified that Rule 10b-5 applied in such transactions.[34] Second, in 1964 the U.S. Supreme Court, at the behest of the SEC, held that shareholders could sue for both injunctive relief and damages for false and misleading statements in proxy materials. The Court wrote that private enforcement of the federal securities laws "provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possibility of civil damages or injunctive relief serves as a most effective weapon in the enforcement of [those provisions]."[35] In other words, the SEC and the Court viewed private securities actions as a species of the private attorneys general model.[36] Proponents of this enforcement philosophy argue that

[33] Joel Seligman, The Transformation of Wall Street 346 (3d ed. 2003).

[34] *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961).

[35] J.I. Case Co. v. Borak, 377 U.S. 426, 432-33 (1964).

[36] *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 669 (1986).

giving private lawyers incentives to enforce the federal securities laws provides a vital supplement to under-resourced governmental enforcement authorities. Under this view, it makes sense to pay lawyers to bring these cases because private actions deter wrongdoing and provide compensation to defrauded investors.[37]

Before the mid-1960s, such actions were frequently not economically viable because there was no cheap and easy way to aggregate the claims of small, dispersed shareholders. That mechanism would come in 1966 with the liberalization of class actions under Rule 23 of the Federal Rules of Civil Procedure. Before 1966, an injured investor was required to opt into the suit to obtain recovery.[38] As small shareholders are rationally apathetic, it was difficult to cobble together a class of sufficient size to make the action economically viable. The 1966 amendments reversed the polarity of class actions—rather than opting in, class members who did not want to participate had to opt out. Rational apathy would now keep investors in the class action, and lawyers obtained a powerful tool for aggregating myriad small claims.

So, when Larry Milberg and Mel Weiss founded Milberg Weiss in 1965,[39] their timing could hardly have been better. Their business plan sought to capitalize on these legal changes, something that other law firms had been reluctant to do. The new class action rules required the lawyer to notify absent class members who would be bound by any judgment, and many lawyers did not want to undertake that expense. Milberg and Weiss did,[40] and they quickly became one of the leading firms in a high growth industry.[41] As shown in Figure 2, in 1961 plaintiffs filed just 171 private actions involving the federal securities laws. Those cases constituted just 0.3% of

[37] Joel Seligman, *The Merits Do Matter: A Comment on Professor Grundfest's 'Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority,'* 108 Harv. L. Rev. 438 (1994).

[38] *See* Arthur R. Miller, Comment, *Of Frankenstein Monsters and Shinning Knights: Myth, Reality, and the "Class Action Problem,"* 92 Harv. L. Rev. 664, 670 (1979).

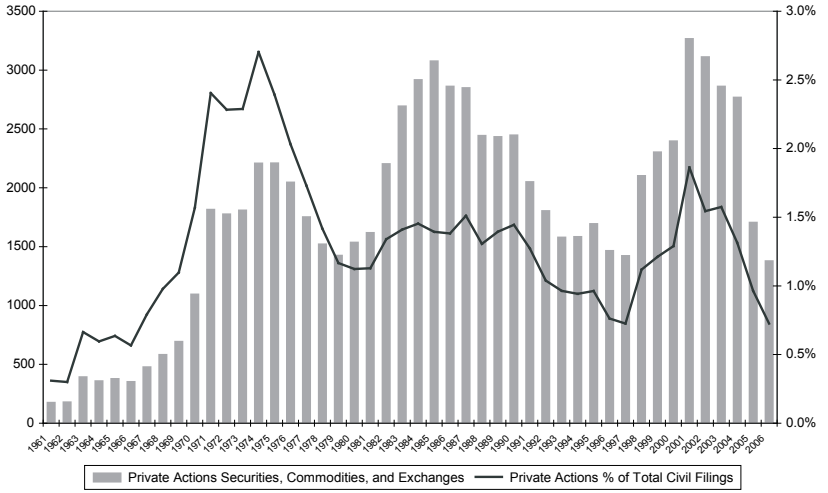
[39] Joseph C. Goulden, The Money Lawyers 260-61 (New York: St. Martin's Press 2006).

[40] *Id*. at 261.

[41] *Id*. at 261-62. The firm had an early major win in a case brought against Dolly Madison Industries and its auditors, Touche Ross. Weiss claims, "Dolly Madison established our reputation for financial fraud cases—we were *the* firm thereafter." *Id*. (emphasis in original).

all federal court civil filings.[42] By 1975, ten years after Milberg Weiss was formed, plaintiffs' lawyers collectively filed over 2,200 federal securities lawsuits. Those actions accounted for 2.7% of all federal civil filings, a ninefold increase over 1961.

Figure 2: Private Securities Actions in Federal Courts (1961-2006)



With this rapid rise in litigation, it quickly became apparent that there were significant costs to relying on private enforcement. A good deal of ink has been spilled over the years discussing these problems, and there is no need to exhaustively catalog them here.[43] At bottom, scholars quickly came

[42] Ideally, it would be useful to present data on the total number of issuers sued in a given year. Such data are not available until the 1980s. The data presented here are from the Administrative Office of the United State Courts, which aggregates class and individual actions as well as securities and commodities laws actions. These data overstate the number of issuers sued because issuers are frequently sued in multiple complaints, each of which is counted separately. While the data are thus not an accurate reflection of the number of issuers sued in securities class actions, they do provide a sense of the explosive growth in the field.

[43] Interested readers can see, among other works, Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1 (1991); John C. Coffee Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877 (1987); John C. Coffee Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer As Bounty Hunter Is Not Working*, 42 Md. L. Rev. 215 (1983).

to recognize that litigation of this type created substantial agency costs. Plaintiffs' attorneys were supposed to act in the best interests of the class, but the typical members of the class had stakes that were too small to make monitoring the attorneys a cost-effective option. The attorney was thus left with largely unfettered discretion in deciding what cases to bring, how to prosecute those cases, and how to settle them.[44] Under these conditions, attorneys had incentives to bring, not only strong cases of fraud, but also marginal or non-meritorious ones purely for their settlement value. Corporations often had strong incentives to settle even ill-founded cases because it was often cheaper to do so than to pay the costs of protracted and expensive discovery or to risk a large jury award or the reputational losses associated with a well-publicized trial.

Many observers of class action practices, however, suspected that there was more to the monitoring problem than just rationally apathetic small shareholders. Many believed that securities class actions frequently featured so-called "professional plaintiffs." These plaintiffs were thought to have long-term relationships with plaintiffs' attorneys pursuant to which they agreed to buy stock in likely litigation targets and to serve as representative plaintiffs in any ensuing action in exchange for payments from the lawyer.[45] This pattern was similar to what many commentators observed in

[44] *See* Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053, 2059 (1995) (recognizing that "it is plaintiffs' attorneys, not aggrieved investors, who initiate and control most class actions"); *see also* Kamen v. Kemper Financial Services, 908 F.2d 1338, 1349 (7th Cir. 1990), *rev'd on other grounds*, 500 U.S. 90 (1991) ("Securities actions, like many suits under Rule 23, are lawyers' vehicles.... Counsel to whom [plaintiff] entrusted the litigation—perhaps more accurately, who found [plaintiff] to wage the litigation—is a specialist in the field...."); Greenfield v. Villager Industries, Inc., 483 F.2d 824, 832 n.9 (3d Cir. 1973) ("Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statement to the contrary is sheer sophistry."); *In re* California Micro Devices Sec. Litig., 168 F.R.D. 257, 261 (N.D. Cal. 1996).

[45] *See* S. Rep. No. 104-98, at 9-10, *reprinted in*, 1995 U.S.C.C.A.N. 685 ("A whole stable of 'professional plaintiffs,' who own shares—or sometimes fractions of shares—in many companies, stand ready to lend their names to class action complaints.") (hereinafter Senate Report); *see also* H.R. Conf. Rep. No. 104-369, at 32 (1995), *reprinted in*, 1995 U.S.C.C.A.N. 731. Firms other than Milberg Weiss have admitted maintaining this kind of client list. *See* Greenfield v. U.S. Healthcare, Inc., 146 F.R.D. 118, 120 & n.1 (E.D. Pa. 1993), *aff'd*, 22 F.3d 1274 (3d Cir. 1994) (noting that firm maintained a list of potential clients but not discussing whether those clients received payments from the firm).

These secret side-payments should be distinguished from the bonuses courts frequently awarded to named plaintiffs as compensation for the expenses associated with taking on that role or as a reward for superior service. *See* Theodore Eisenberg & Geoffrey P. Miller,

derivative lawsuits brought under state corporate law. Well-known examples included Harry Lewis, who served as a plaintiff in an estimated 300 to 400 derivative lawsuits, and William Weinberger, who appeared in 90 derivative and class action lawsuits.[46]

Such agreements are rational for plaintiffs' attorneys. Attorneys were engaged in an increasingly competitive race to get their complaints to the courthouse first because the attorney who filed the first complaint often obtained a significant advantage in securing appointment as lead counsel in the case.[47] Lead counsel typically ran the case, allocating work among the various law firms and collecting the lion's share of any fees.[48] For this reason, cases were often brought within days of a significant stock price drop, with apparently very little investigation into their merits. Having a ready stable of plaintiffs made quicker filing easier and otherwise reduced the costs associated with initiating a case. Of course, these long-term relationships also made it highly unlikely that the named plaintiff would engage in meaningful monitoring of the plaintiffs' attorney. Indeed, even Lerach boasted: "I have the greatest practice of law in the world. I have no clients."[49]

Congress explored the professional plaintiff phenomenon in the hearings that culminated in passage of the PSLRA. Data Milberg Weiss submitted to Congress on cases it had brought over the previous three years confirmed that Milberg Weiss used repeat plaintiffs.[50] In 229 cases, twelve

Emerging Issues in Class Action Law: Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1310 (2006) (finding that courts made awards in 24% of sampled published opinions in securities cases brought before passage of the PSLRA, which banned such payments); Richard A. Nagareda, *Restitution, Rent Extraction, and Class Representatives: Implications of Incentive Awards*, 53 UCLA L. Rev. 1483 (2006).

[46] *See* James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. Pa. L. Rev. 903, 917 (1996). For other examples, see Kaldoner v. Michaels Stores, Inc., 172 F.R.D. 200, 206-07 (N.D. Tex. 1997) (plaintiff Richard Manson brought eighteen class actions in five years); In re Gibson Greetings Sec. Litig., 159 F.R.D. 499, 501 (S.D. Ohio 1994) (plaintiff William Steiner brought thirty-nine class actions over three-year period).

[47] *See* Garr v. U.S. Healthcare, Inc., 22 F.3d 1274, 1277 (3d Cir. 1994); Weiss and Beckerman, *supra* note 44, at 2062-63.

[48] Weiss and Beckerman, *supra* note 44, at 2062-63.

[49] Senate Report, *supra* note 45, at 10, *citing* William P. Barrett, *I Have No Clients*, Forbes, Oct. 11, 1993, at 52.

[50] Private Litigation Under the Federal Securities Laws: Hearings Before the Subcomm. on Sec. of the Senate Comm. on Banking, Hous., and Urban Affairs, 103d Cong. 465-546 (1994) (hereinafter 1993 Senate Hearings).

individuals appeared as representative plaintiffs in at least four securities class actions, including Cooperman who was a plaintiff in fifteen lawsuits over a three year period.[51] Of course, these data are hardly complete, both because they only cover a short time period and because they do not reveal family or other relationships that might exist among different named plaintiffs. The indictment, for example, alleges that Cooperman, his family members, and his associates collectively served as representative plaintiffs in seventy lawsuits.[52]

What is more, the data shed no light on the full extent of financial rewards lead plaintiffs reaped. Indeed, a review of the hearing testimony shows that Milberg Weiss attorneys did their best to avoid answering whether the firm paid individuals to serve as lead plaintiffs and, if so, how much they paid. When Senator Domenici asked Weiss to provide information on the bonuses plaintiffs received, Weiss deftly limited his response to "court-awarded bonuses."[53] Responding to a charge by Representative Billy Tauzin that law firms paid plaintiffs and have their names on computer discs, Lerach wrote the Committee: "This is completely false. Outright character assassination. We have no such disc or list."[54] He, of course, did not respond to the payment allegation.

Ultimately, Congress adopted several provisions in the PSLRA aimed at restricting or deterring professional plaintiffs. First, the Act requires that each plaintiff seeking to serve as a representative party on behalf of the class provide a sworn certification that attests, among other things, that the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in the federal securities class action.[55] The plaintiff must also identify any other action during the prior three-year period in which she served or sought to serve as a lead plaintiff, and state that she will not accept any payment for serving as lead plaintiff other than her pro rata share of any recovery.[56] The PSLRA also bans incentive payments and limits anyone from serving as a lead plaintiff more than five times during any three-year period.[57]

[51] *Id*. at 472–502.
[52] Indictment at ¶ 37.
[53] 1993 Senate Hearings, supra note 50, at 330, 467.
[54] 1993 Senate Hearings, supra note 50, at 838.
[55] 15 U.S.C. §§ 77z-1(a)(2)(i)-(ii), 78u-4(a)(2)(i)-(ii).
[56] 15 U.S.C. §§ 77z-1(a)(2)(iv)-(vi), 78u-4(a)(2)(iv)-(vi).
[57] 15 U.S.C. §§ 77z-1(a)(3)(B)(vi), 77z-1(a)(4), 78u-4(a)(3)(B)(vi), 78u-4(a)(4).

III. The Case Against Milberg Weiss

A. The Indictment and the Defense

The indictment mirrors the long-standing rumors with respect to professional plaintiffs. According to the first superseding indictment, Milberg Weiss agreed to pay a percentage of its attorneys' fees (typically five to ten percent) to individuals willing to serve as lead plaintiffs in both federal and state class actions.[58] Those payments were made, the government alleges, in over seventy cases that spanned a time period from 1981 through 2005. While most of those cases were filed and settled before 1995, some occurred after the PSLRA specifically banned such payments. Several even occurred after the grand jury had begun to investigate Milberg Weiss for these practices.[59]

The indictment focuses on three representative plaintiffs who allegedly received kickbacks. The first is Steven Cooperman, who with various associates and family members, allegedly received payments of approximately $6.5 million for agreeing to serve as representative plaintiff in seventy lawsuits, twenty-two of which are named in the indictment. Of those twenty-two, nineteen are federal securities fraud class actions.[60] Howard Vogel, a retired commercial real estate broker, and members of his family allegedly received approximately $2.5 million for serving as lead plaintiffs in forty Milberg Weiss lawsuits, although only sixteen are listed by name in the indictment.[61] Of those sixteen, four appear to be federal securities class actions. The final kickback recipient is Seymour Lazar, a retired lawyer and real estate developer from Palm Springs, California. Lazar or members of his family allegedly received $2.4 million for agreeing to serve as representative plaintiffs in approximately seventy lawsuits, although the complaint alleges only nineteen by name, ten of which were federal securities fraud class actions.[62]

[58] Indictment at ¶¶ 26-27. This section and the remainder of the paper are based on the first superseding indictment, filed in October 2004. The second superseding indictment's allegations are similar, but the first provides much more detailed information on the cases in which kickbacks were allegedly paid.
[59] Peter Elkind, *The Fall of Milberg Weiss*, Fortune, Nov. 13, 2006, at 154.
[60] Indictment at ¶ 37.
[61] Indictment at ¶¶ 35-36.
[62] Indictment at ¶ 34.

The indictment alleges a variety of crimes flowing from these payments, including conspiracy, racketeering, mail and wire fraud, and money laundering. The government asserts that these payments created a conflict of interest between the plaintiffs and the remainder of the class because the plaintiffs now had "a greater interest in maximizing the amount of attorneys' fees awarded to MILBERG WEISS than in maximizing the net recovery to the absent class members and shareholders."[63] The indictment alleges that the absent class members suffered a tangible economic harm from this scheme because they were deprived of "the amount of any kickback MILBERG WEISS paid using attorneys' fees obtained in the lawsuit."[64] In other words, every dollar paid in kickbacks was another dollar that could have gone to compensate the class.[65] All told, the government alleges that Milberg Weiss obtained more than $216 million in attorneys' fees in these lawsuits, of which it passed $11.3 million on to the representative plaintiffs.

Milberg Weiss originally contested that the payments were kickbacks, arguing instead that they constituted legitimate referral payments made to lawyers. The various plea agreements, however, acknowledge that the payments were indeed kickbacks. At one time, the firm maintained a website devoted to refuting the government's charges, but that site now appears to have been taken down. While it was up, however, Milberg Weiss argued that the alleged conflict between the lead plaintiff receiving kickbacks and the remainder of the class was "completely illusory" because:

> Milberg Weiss's referral fees are paid out as a percentage of the attorney's fees awarded by the court. Generally, higher settlements translate into higher attorney fees. If a lead plaintiff was being paid a percentage of the attorney fees, the lead plaintiff would have every incentive to maximize the settlement amount. Referral fees also come out of the attorney's share of the damage award, not the class's share.[66]

In any event, the firm argues, courts are required to approve any fees awarded in class actions and thus judges would reduce any fee requests that were excessive.

B. Do Kickbacks Harm Absent Class Members?

The potential real world impact of kickbacks is more nuanced than either the government's or Milberg Weiss' positions. Consider, for example, Milberg Weiss' claim that the lead plaintiff has an incentive to maximize settlement amounts. The incentive to maximize and the ability to maximize are two vastly different things. The reality of securities class action practice is that these lawsuits tend to be almost entirely lawyer-driven. Anecdotal evidence strongly suggests that small stakes plaintiffs play no or virtually no role in controlling the case or in negotiating settlements.[67] Thus, it is unclear that the actions of these plaintiffs can affect settlement amounts. Indeed, it is worth noting that in cases in which plaintiffs have objected to a settlement negotiated by the lawyers, courts frequently hold that the attorney has the power to settle the case despite those objections.[68]

Even if representative plaintiffs have an incentive to maximize settlements and are capable of doing so, Milberg Weiss' argument remains incomplete.

[63] Indictment at ¶ 29. This view is consistent with the view of some courts and commentators who have criticized court-awarded bonuses paid to class representatives. *See* Wesley v. Spear. Leeds & Kellogg, 711 F. Supp. 713, 702-21 (E.D.N.Y. 1989) ("if class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard").

[64] Indictment at ¶ 33.

[65] The indictment alleges two other harms as well. It alleges that class members were deprived of the honest services of Milberg Weiss and the named plaintiffs and were deprived of material economic information that affected their right and ability to influence and control the litigation brought on their behalf. Indictment at ¶ 33.

[66] *See* The Case: Based on a Flawed Theory, http://www.milbergweissjustice.com/hecase_flawed.php.; *see also* Schulman Motion to Dismiss Brief at 4 ("[E]ven assuming that the named plaintiffs had an interest in maximizing the attorneys' fee award, that interest would best be served by urging class counsel to litigate aggressively on behalf of the plaintiff class and to achieve the best possible settlement for that class.").

[67] Weiss & Beckerman, *supra* note 44, at 2064-65 ("No one disputes that a named plaintiff who has only a nominal financial interest in a class action, especially a plaintiff that an attorney has 'recruited,' is unlikely to monitor effectively her attorney's prosecution of the action or the terms on which her attorney recommends that the action be settled.").

The same is not true for the large public pension funds that have increasingly begun to serve as lead plaintiffs in actions filed after passage of the PSLRA. Available evidence shows that cases with public pension participation are positively correlated with settlement amounts (measured both in absolute terms and as a proportion of investors' overall market losses), even when controlling for institutional self-selection of larger, more high profile cases. *See* Michael A. Perino, *Institutional Activism through Litigation: An Empirical Assessment of Public Pension Fund Participation in Securities Class Actions*, http://papers.ssrn.com/abstract=938722.

[68] *See, e.g.*, Koehler v. Brody, 483 F.3d 590, 598-99 (8th Cir. 2007); Saylor v. Lindsay, 456 F.2d 896, 899-900 (2d Cir. 1972).

The representative plaintiffs in these cases had an incentive to maximize not just settlement size but rather their total recovery. That recovery is jointly determined by four variables: (1) the cost the lead plaintiff incurs to participate in the case; (2) the size of the settlement; (3) the size of the kickback; and (4) the size of the attorneys' fee. Most plausibly, it is the latter two that are likely to be the biggest drivers of the lead plaintiff's recovery.

To see this, consider the three alternative hypothetical scenarios outlined in Table 1A. Each scenario assumes that the representative plaintiff purchased 100 damaged shares during the class period, that there are a total of 200,000 damaged shares, that all affected shares were equally damaged, and that the plaintiff has negotiated a ten percent kickback of the fee paid to the law firm. The plaintiff's costs to participate in the action are assumed to be the same in all three scenarios and are therefore omitted from the analysis.

In Scenario One, the plaintiffs' attorney negotiates a $10 million settlement and requests and receives a twenty-five percent fee award. Recoveries to the class are net of attorneys' fees, so in this scenario the representative plaintiff will recover $3,750 as a member of the class and $250,000 pursuant to the kickback arrangement, for a total recovery of $253,750.

Milberg Weiss argues that the representative plaintiff has an incentive to push for a larger settlement and that therefore its incentives are aligned with those of the remaining members of the class. This is Scenario Two. There, we can assume, the plaintiff rejects the $10 million settlement offer, continues to litigate the case, and succeeds in obtaining a twenty percent increase in the settlement, which is now $12 million. Because the representative plaintiff has such a small stake in the outcome of the case as a class member, holding out for the higher settlement only increases its class recovery by an additional $750. It has, however, a much bigger stake in the fee award. Assuming the same percentage fee award to class counsel as in Scenario One (25%), it now receives an additional $50,000 pursuant to the kickback arrangement, for a total recovery of $304,500.

Based on the indictment, the government would appear to argue that the class is harmed in Scenario Two because the dollars paid to the representative plaintiff could have been distributed to the class. While this is

Table 1A:

Hypothetical Recoveries for Small Stakes Representative Plaintiff Receiving a Kickback

	Scenario 1	*Scenario 2*	*Scenario 3*
Class Recovery			
Settlement	$ 10,000,000	$ 12,000,000	$ 10,000,000
Attorneys' Fee	25%	25%	30%
Net Recovery to Class	**$7,500,000**	**$9,000,000**	**$7,000,000**
Representative Plaintiff's Recovery			
Recovery as Class Member	$ 3,750	$ 4,500	$ 3,500
Kickback	$ 250,000	$ 300,000	$ 300,000
Net Recovery to Representative	**$ 253,750**	**$ 304,500**	**$ 303,500**

Table 1B:
Hypothetical Recoveries for Larger Stakes Representative Plaintiff Receiving a Kickback

	Scenario 1	*Scenario 2*	*Scenario 3*
Class Recovery			
Settlement	$ 10,000,000	$ 12,000,000	$ 10,000,000
Attorneys' Fee	25%	25%	30%
Net Recovery to Class	**$7,500,000**	**$9,000,000**	**$7,000,000**
Representative Plaintiff's Recovery			
Recovery as Class Member	$ 75,000	$ 90,000	$ 70,000
Kickback	$ 250,000	$ 300,000	$ 300,000
Net Recovery to Representative	**$ 325,000**	**$ 390,000**	**$ 370,000**

potentially true, it is also possible that those additional sums would never have been obtained without the spur from the incentive payment. If, as Milberg Weiss assumes, the percentage fee is the same in both cases and if the kickback causes the representative plaintiff to push for and get the big-

ger settlement, then the class may well be better off than it would have been without the kickback.[69] Even though the attorney and the lead plaintiff do better in Scenario Two, it is not necessarily at the expense of the class, which at the end of the day has increased its net recovery from $7.5 million to $9 million.[70] Yes, the lead plaintiff receiving a kickback and the lawyer are better off, but so is the class.

Does this mean that kickbacks never cause harm? No, because there is another strategy available to the lead plaintiff to maximize its recovery, one, in fact, that may be far more appealing. As shown in Scenario Three, rather than rejecting the $10 million settlement the plaintiff can accept it and permit the attorney to increase its fee request, say from twenty-five to thirty percent. Under this scenario, the class is much worse off—$500,000 that otherwise would have been distributed to the class goes into the pockets of the law firm and the representative plaintiff. The representative plaintiff, however, recovers virtually the same amount ($303,500) as in Scenario Two because her return is driven primarily by the size of the fee award rather than her tiny percentage of the class' net recovery.

Why might allowing the attorney to charge a higher fee represent a much more attractive option than pushing for a bigger settlement? Holding out for a bigger settlement will likely entail additional litigation and a delay in payment. Even if the delay is only a year and the plaintiff has a low discount rate, say five percent, the net present value of the payment to the representative plaintiff in Scenario Two is $290,000, worse than Scenario Three. The lawyer will likely prefer Scenario Three as well because it will avoid the additional litigation expenses associated with holding out for a higher settlement, and so its net profit from the case will be larger. Additional litigation also is likely to create a significant opportunity cost for both the lawyer and the representative plaintiff. Resources devoted to this case might otherwise be used in other cases in which the lawyer could obtain a fee and the representative plaintiff could obtain a kickback. And, lawyers

[69] Schulman Motion to Dismiss at 3 ("The alleged payments to named plaintiffs came out of Milberg Weiss' pocket, and did not diminish the recovery of the class members in any way."). Other commentators make the same argument as well. *See* Kobayashi and Ribstein, *supra* note 21, at 378.

[70] In reality, the class does not do quite so well because additional litigation is likely to mean a delay in payment. Assuming the class has a discount rate of five percent and the additional litigation delays payment for a year, the net present value of its recovery in Scenario Two is approximately $8.57 million.

are much more likely to want to use representative plaintiffs that have demonstrated their willingness to be flexible on fees in future cases.

The calculus for representative plaintiffs naturally changes as their stakes in the litigation grow larger or the kickbacks grow smaller. When this happens, the incentives of the representative plaintiffs are better aligned with the incentives of the class members because settlement size becomes a larger component of their total return from the litigation. Under some conditions, representative plaintiffs receiving kickbacks may well maximize their returns by holding out for higher settlements. To see this, recall that Scenarios One through Three assumed that plaintiff owned just 100 of the 200,000 affected shares (0.05% of the total). Assume instead that the representative plaintiff owns 2,000 shares (or 1% of the total affected shares). Now, as shown in Table 1B, both the representative plaintiff and the class as a whole do better by holding out for a higher settlement (Scenario Two) then by settling early in exchange for a high fee (Scenario Three).[71] Similar results would obviously be obtained if the size of the kickback were decreased.

Thus, kickbacks (or revenue sharing as they somewhat less pejoratively might be dubbed) are not unambiguously harmful or beneficial to absent class members. Their impact depends on their size and on the size of the representative plaintiff's stake in the underlying claim. It is only where large kickbacks are combined with small stakes that kickbacks may create perverse incentives for the lead plaintiff. Under these conditions, rather than negotiating with counsel for the lowest fee or pushing for the highest settlement, the named plaintiffs may prefer to have the lawyers paid as much as possible as a way to maximize their own recovery.

Unfortunately, the indictment does not allege how large the plaintiffs' stakes were in the cases in which kickbacks were allegedly paid or the number of shares alleged to have been affected by any misrepresentation or omission. There is, however, strong reason to believe that the plaintiffs in these cases had quite small stakes and therefore that the kickback was the primary source of their return in the case. Anecdotal evidence certainly suggests that professional plaintiffs' stakes were typically small.[72] Indeed, it

[71] This result remains true even if we use the same discount rates that we previously assumed, which would reduce that net present value of the representative plainitff's return in Scenario 2 to $371,428.57.

[72] Coffee, *supra* note 36, at 378; Macey & Miller, *supra* note 43, at 20.

would be irrational for professional plaintiffs to invest heavily in any one litigation target because one damaged share would be sufficient to give them standing in the case. During most of the time period when kickbacks were allegedly paid, the size of the plaintiff's stake in the case was not a relevant factor courts considered in selecting class counsel. Still, without definitive evidence on the size of the representative plaintiffs' stakes, it remains possible, albeit highly unlikely, that the representative plaintiffs had stakes that were large enough to represent a substantial portion of their return from the case and therefore to give them strong incentives to maximize settlements.

The harm flowing from kickback payments depends on one other assumption—that Milberg Weiss and the plaintiffs receiving kickbacks had the ability to both settle cheaply and to charge excessive fees. Of course, existing checks in the class action system are supposed to prevent both cheap settlements and excessive fees.[73] In particular, Milberg Weiss' argument that courts act as effective monitors relies on Rules 23(e) and 23(h) of the Federal Rule of Civil Procedure, which require the court to approve the settlement only if it is "fair, reasonable, and adequate." Any award of attorneys' fees must also be "reasonable." In essence, Rule 23 asks the court to serve as the class' agent in monitoring the attorney precisely because of the danger of potentially collusive settlements.[74]

But, it is not entirely clear how well these checks work in practice. Indeed, there is a well-developed literature on the ineffectiveness of *ex post* judicial monitoring of settlements and fee awards.[75] The typical litigation mechanism available to provide information to the court, adversarial testing of the proposed settlement, is largely ineffective because the defendants have no incentive to challenge its terms. Rather, once a settlement is reached, the formerly adversarial process vanishes and "the attorneys for the plaintiff stockholders link arms with their former adversaries to defend their

[73] *See* The Case: Based on a Flawed Theory, http://www.milbergweissjustice.com/the-case_flawed.php.; Schulman Motion to Dismiss at 1. Other commentators make the same argument. *See* Kobayashi and Ribstein, *supra* note 22, at 379.

[74] Third Circuit Task Force, *Report on Court Awarded Attorneys Fees*, 108 F.R.D. 237, 255 (1985) (noting that judge "must monitor the disbursement of the fund and act as a fiduciary for those who are supposed to benefit from it").

[75] *See, e.g.*, Janet Cooper Alexander, *Do the Merits Matter? A Case Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 499 n.5 (1991).

joint handiwork…."[76] That leaves as the only potential adversaries objectors from the class. Objectors, however, are relatively rare because they can expect only a miniscule benefit from any change in terms.[77]

Judges have incentives to approve settlements as well because doing so will allow them to clear their dockets of time consuming and difficult cases. When coupled with their comparative lack of information about the merits of the case, it is not unusual to see that judges tend to have little stomach for delving deeply into the details of the settlement.[78] Instead, time and again they invoke the axiom that even a bad settlement is better than a good litigation.[79] Given these dynamics, it is not surprising that a study conducted by the Federal Judicial Center found that approximately 90% of the settlements it analyzed were approved without changes.[80]

Similar problems arise with respect to fee awards. Indeed, fees may present even greater difficulties because in most cases there is no readily ascertainable market rate for the services of plaintiffs' attorneys in securities class actions, requiring courts to attempt to "recreate the market."[81] As the Third Circuit's Task Force on the Selection of Class Counsel noted, a court reviewing a fee proposal *ex post* "may be hard-pressed to assess the risks as perceived *ex ante*, the difficulty of the case, and the benefits provided by counsel."[82]

Once a settlement is achieved, the defendant obviously has little or no incentive to police how that fund is allocated between the class and the attorneys.[83] Objections to fee awards from class members are about as rare

[76] Alleghany Corp. v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting), *aff'd per curiam*, 340 F.2d 311 (2d Cir. 1965) (*en banc*), *cert. dismissed*, 384 U.S. 28 (1966).

[77] *See* Weiss & Beckerman, *supra* note 44, at 2066. In an empirical study of class actions in four district courts, researchers at the Federal Judicial Center found that in 42% to 64% of the cases analyzed there were no objections to settlements. Thomas E. Willging, Laural L. Hooper and Robert J. Niemic, Empirical Study of Class Actions in Four District Courts: Final Report to the Advisory Committee on Civil Rules (1996).

[78] *See* Macey & Miller, *supra* note 43, at 39 (1991).

[79] *See, e.g., In re* Warner Communications Sec. Litig., 618 F. Supp. 735, 742 (S.D.N.Y. 1985).

[80] Willging, et al., *supra* note 77, at 62.

[81] Taubenfeld v. Aon Corp., 415 F.3d 597, 599 (7th Cir 2005).

[82] Third Circuit Task Force, *Report on the Selection of Class Counsel*, at 11 (2002).

[83] *Task Force Report*, 108 F.R.D. at 266 ("Since the defendant is interested only in the total size of its liability, so long as the settlement is accepted, it will often be indifferent as

as objections to the other terms of the settlement.[84] Given this absence of adversarial testing in the typical fee application, think of the difficult position the district court judge juggling a full docket of cases faces. Because many fee decisions are unpublished, courts frequently rely on plaintiffs' attorneys' compilations of unpublished orders, which would likely be carefully selected to support the fee the attorney had requested. This is a particular problem given that the factors courts generally list as relevant to fee determinations are sufficiently broad so as to support virtually any fee award.[85] There is thus ample reason to believe that judicial monitoring provides little safeguard against either low settlements or high fees.

C. Testing the Impact of Kickbacks

Ultimately, the theoretical analysis of the potential impact of kickbacks in securities class actions leaves us with a series of empirical questions. What were the actual effects of paying kickbacks to plaintiffs in the indictment cases? Did the plaintiffs in fact hold out for higher settlement amounts? Did the courts hold excessive fee requests in check? Or, were settlements in the indictment cases the same as or lower than settlements in other similar cases? Did Milberg Weiss ask for and get higher fees? Fortunately, we do not have to rely on conjecture in answering these questions. Instead, we can analyze them quantitatively using available data on settlements and fee awards in securities class actions.

The analysis in this section suggests a number of testable hypotheses. The first two concern the effect those kickbacks had on settlement amounts. If representative plaintiffs receiving kickbacks have incentives to hold out for higher settlements and are capable of doing so then, all else being equal, the settlements in the cases alleged in the indictment should be higher, on average, than settlements in other class actions. Likewise, if plaintiffs held out for higher settlements, then settlements measured as a proportion of potential damages should be higher in the indictment cases.

With respect to attorneys' fee requests, if representative plaintiffs maximize their return by allowing the attorneys to charge an excessive fee or if conflicted monitors allow higher fee requests, then we should see fee requests in the indictment cases that are higher, all else being equal, than fee requests in other cases. A similar pattern should exist for fee awards. If lawyers obtained larger fees in the cases in which they paid kickbacks, we should see a significant positive association between the indictment cases and fee awards. Finally, we can evaluate how vigorously judges monitor fees by comparing fee requests to the fees actually awarded and test whether there is any significant difference between the indictment and non-indictment cases.

to the division of the fund between plaintiffs' recovery and the attorneys' fee.").

[84] Willging, et al., *supra* note 77, at 76 (finding that objections concerning the amount of attorneys' fees were lodged in only 18.7% of the cases studied).

[85] Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000), contains a frequently cited compilation of factors that courts generally view as relevant in setting fees:

> In common fund cases of this sort—in which the attorneys' fees and the clients' award come from the same source and the fees are based on a percentage amount of the clients' settlement award—district courts should consider several factors in setting a fee award. Among other things, these factors include: (1) the size of the fund created and the number of persons benefitted [sic]; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases.

IV. The Data

Analysis of these hypotheses began with a dataset of settlements in federal securities class actions filed from 1984 through 2005 and settled from 1991 through 2007. That time period includes the period in which Milberg Weiss is alleged to have paid kickbacks. Settlements in the original database were identified using Institutional Shareholder Service's Securities Class Action Services' database (ISS), a pre-existing database of securities class action settlements, and from two newsletters, *Securities Class Action Alert* and *Class Action Reports*, that provide information on legal decisions and settlements in class action lawsuits. Collectively, these sources appear to provide comprehensive coverage of securities class action settlements.

The first superseding indictment identifies by name fifty-six cases in which Milberg Weiss allegedly paid kickbacks. It is much more specific than the second superseding indictment in terms of providing detailed case information, and so it served as the starting point for the analysis. Twenty-four of the cases alleged in the first superseding indictment were derivative suits filed in state court under state causes of action. State derivative lawsuits were not part of the original dataset and so these cases were excluded from the analysis to ensure comparability. Of the remaining thirty-two federal class actions, data were available for all but one. Some of these cases yielded multiple, partial settlements. Because the unit of observation in the dataset is the individual settlement, the total sample of settlements analyzed was 731 (695 non-indictment settlements and 36 indictment settlements). An indicator variable (*Indictment*) takes a value of 1 for these 36 cases and 0 otherwise.

Relying solely on the cases the government chose to include in the indictment when making empirical claims about the effects of kickbacks may introduce a significant self-selection bias into the analysis. We do not know the criteria the government used for selecting which cases to allege in the indictment. If the government alleged every case resulting in a settlement in which a kickback was paid, then one could likely assert relatively stronger claims concerning the impact of kickbacks. If, however, the government only chose to allege cases in which it determined that settlements were low

or fee requests or awards were high, then the *Indictment* variable would only tell us how good the government was at picking out cases with low settlements or high fee awards or requests.

To help address this problem, the case information Milberg Weiss submitted to Congress was analyzed to identify other repeat plaintiffs.[86] It seems reasonable to assume that these plaintiffs struck revenue sharing deals that were similar to those that the repeat plaintiffs in the indictment cases struck with Milberg Weiss. The indicator variable *Repeat* takes a value of 1 if one of these repeat plaintiffs or one of those alleged in the indictment is a representative plaintiff in the case. *Repeat* is then used in lieu of *Indictment* in the regressions as an alternative way to measure the impact of kickbacks.[87]

For all of the cases in the dataset, data were collected on variables that past studies have shown are correlated with settlement or fee amounts.[88] These data fall into three broad categories: (1) data on issuer-defendant characteristics; (2) data on case characteristics; and (3) data on settlement characteristics.

A. Issuer-Defendant Characteristics

Information on the financial characteristics of the issuer defendants is from the University of Chicago Center for Research in Security Prices (CRSP), and from COMPUSTAT. In certain cases, these data were supplemented with data from SEC filings. Consistent with prior research,[89] this paper uses two proxies for the potential damages in the case. *MDL* is the maximum dollar loss during the class period alleged in the complaint and is defined as the dollar value decrease (in constant 2005 dollars) of the defendant issuer's market capitalization from its peak market capitalization during the class period to the first trading day after the end of the class period. Past studies have shown that *MDL* is highly correlated with potential damages.[90] *Class Period* is the length in years from the beginning to the

[86] *See supra* Section II.
[87] All indictment cases are thus coded 1 for *Repeat*.
[88] These studies are discussed in more detail in Perino, *supra* note 67.
[89] *Id*.
[90] *See, e.g.*, Perino, *supra* note 67; Mukesh Bajaj, Sumon C. Mazumdar and Atulya Sarin, *Securities Class Action Settlements: An Empirical Analysis*, 43 Santa Clara L. Rev. 1001, 1014 (2002-2003).

end of the class period. The longer the class period, the more shares that are affected by the alleged fraud and the greater the potential damages.

Two other issuer characteristics are included in the regressions. First, the paper uses *Total Assets* as of the end of the class period as a measure of firm size. Second, data were collected on whether the issuer defendant declared *Bankruptcy* before the settlement,[91] which may lower settlement recoveries.[92]

B. Case Characteristics

Data on case characteristics come from a variety of sources, including published judicial decisions, settlement notices, media articles, the Stanford Securities Class Action Clearinghouse (SSCAC), and from docket sheets and court filings available through the federal courts' Case Management/Electronic Case Filing (CM/ECF) or PACER systems. The variables coded were:

(1) the presence of certain allegations in the complaint (that the issuer-defendant restated its financials (*Restatement*) or otherwise violated Generally Accepted Accounting Principles (*Accounting*), which may be correlated with the merits of the case);

(2) the presence of additional defendants (*Auditor* or *Underwriter*), which may be the source of additional settlement dollars; and

(3) the number of docket entries in the case (*Docket Entries*) and the age of the case (in years) from first filing until settlement (*Age*), both of which serve as proxies for case complexity and litigation effort.

Data were also collected on the presence of an SEC or other governmental action (*Government Action*) involving the same allegations at issue in the securities class action, which may serve as a proxy for case quality (and therefore may be correlated with larger settlements).[93] A *Government Action* may also suggest that less litigation effort was necessary to achieve the settlement, possibly resulting in lower fees.

[91] This variable was coded using Westlaw's Bankruptcy database.

[92] Steven P. Marino and Renee D. Marino, *An Empirical Study of Recent Securities Class Action Settlements Involving Accountants, Attorneys, or Underwriters*, 22 Securities Reg. L.J. 115, 141 (1994).

[93] This variable was coded using the SEC's Litigation Releases, Lexis, and Westlaw.

Past research has shown four other factors that are relevant to either settlement amounts or fees. First the presence of a public pension fund as a lead plaintiff (*Public Pension*) has been shown to be correlated with higher settlements and lower fees and fee requests.[94] Second, high profile class actions may settle for more or result in lower fee awards, all else being equal. The paper therefore defines an indicator variable (*High Profile*) that takes a value of 1 if the case involves an *MDL* in the top quartile of the sample, an alleged *Accounting* violation, and a *Government Action* and 0 otherwise. Third, a few courts have experimented with auctioning off the role of lead counsel (*Auction*). Although such auctions are rare and have been subject to both academic[95] and judicial[96] criticism, some research suggests that they are correlated with lower fee requests and fee awards.[97] Fourth, prior research has shown that judicial experience (*Experience*) with securities class actions (measured here by the proportion of securities class actions filed in a district over a five-year study period) is negatively correlated with fee awards.[98]

To control for inter-circuit variation in the treatment of settlements or fees, the regressions include indicator variables for circuits, with the Second Circuit as the reference category. To control for potential changes in settlements, fee requests, or fee awards over time, indicator variables were created for each year in which a settlement was approved and fees were awarded. The regressions use 2007, the latest settlement year in the dataset, as the reference category.

[94] Perino, *supra* note 67, at 12–13; James Cox and Randall Thomas, *Does the Lead Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*. 106 Colum. L. Rev. 1587, 1591 (2006).

[95] *See, e.g.*, Jill E. Fisch, *Lawyers on the Auction Block*, 102 Colum. L. Rev. 650, 727–28 (2002).

[96] *Report on the Selection of Class Counsel*, *supra* note 82, at 30–40.

[97] Perino, *supra* note 67, at 29.

[98] Michael A. Perino, *Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870577.

Table 2: Descriptive Statistics

	N	Mean	Median	Std. Dev.	Kurtosis	Skewness
Indictment	731	0.049	0	0.217	4.166	18.357
Repeat	731	0.07	0	0.255	3.378	12.408
Total Settlement	731	65.041	8.328	393.451	12.765	184.658
Partial Settlement	731	53.067	7.259	274.288	10.237	117.586
Fee Request (%)	717	0.294	0.3	0.057	-1.777	6.567
Fee (%)	700	0.266	0.28	0.067	-0.994	4.605
MDL	681	4346.282	499.058	17795.13	7.728	69.451
Class Period	727	1.32	1	1.072	1.531	6.649
Total Assets	693	7463.312	330.397	39444.442	11.964	187.159
Bankruptcy	731	0.208	0	0.406	1.439	3.072
Gov't Action	731	0.354	0	0.479	0.609	1.371
Restatement	730	0.288	0	0.453	0.938	1.88
Accounting	730	0.568	1	0.496	-0.277	1.076
Auditor	731	0.185	0	0.388	1.625	3.641
Underwriter	731	0.164	0	0.371	1.813	4.288
Docket Entries	730	191.233	113	331.55	10.023	148.061
Case Age	731	2.955	2.619	1.625	1.388	6.243
Experience	731	0.061	0.049	0.041	0.072	1.427
Public Pension	731	0.115	0	0.319	2.415	6.832
High Profile	731	0.086	0	0.281	2.949	9.697
Auction	731	0.018	0	0.132	7.297	54.249
Milberg	731	0.49	0	0.5	0.041	1.002
Non-Cash	731	0.16	0	0.367	1.854	4.438
Securities	730	0.125	0	0.331	2.273	6.164
1st Circuit	731	0.055	0	0.228	3.916	16.333
2nd Circuit	731	0.354	0	0.479	0.609	1.371
3rd Circuit	731	0.064	0	0.245	3.553	13.622
4th Circuit	731	0.026	0	0.159	5.958	36.5
5th Circuit	731	0.052	0	0.222	4.036	17.292
6th Circuit	731	0.045	0	0.208	4.382	20.199
7th Circuit	731	0.037	0	0.189	4.91	25.112
8th Circuit	731	0.022	0	0.146	6.535	43.71
9th Circuit	731	0.259	0	0.438	1.103	2.216
10th Circuit	731	0.023	0	0.151	6.326	41.024
11th Circuit	731	0.062	0	0.241	3.648	14.31
D.C. Circuit	731	0.001	0	0.037	26.982	729.001
Year 1991	731	0.011	0	0.104	9.401	89.386
Year 1992	731	0.016	0	0.127	7.611	58.933
Year 1993	731	0.019	0	0.137	7.017	50.234
Year 1994	731	0.021	0	0.142	6.764	46.754
Year 1995	731	0.018	0	0.132	7.297	54.249
Year 1996	731	0.06	0	0.238	3.698	14.678
Year 1997	731	0.038	0	0.192	4.811	24.147
Year 1998	731	0.047	0	0.211	4.307	19.549
Year 1999	731	0.06	0	0.238	3.698	14.678
Year 2000	731	0.101	0	0.302	2.644	7.991
Year 2001	731	0.107	0	0.309	2.548	7.491
Year 2002	731	0.135	0	0.342	2.131	5.54
Year 2003	731	0.13	0	0.336	2.201	5.844
Year 2004	731	0.101	0	0.302	2.644	7.991
Year 2005	731	0.07	0	0.255	3.378	12.408
Year 2006	731	0.033	0	0.178	5.243	28.492
Year 2007	731	0.033	0	0.178	5.243	28.492

Note: *Total Settlement*, *Partial Settlement*, *MDL*, and *Total Assets* are in millions of constant 2005 dollars. *Fee Request* and *Fee* are percentages of the relevant *Partial Settlement*. *Class Period* and *Case Age* are in years. Sources: Institutional Shareholder Services, *Securities Class Action Database*; Stanford Law School, *Securities Class Action Clearinghouse*; CRSP; COMPUSTAT; CM/ECF; PACER; *Securities Class Action Alert*; *Class Action Reports*.

C. Settlement Characteristics

Settlement characteristics were coded using data from ISS, SSCAS, *Securities Class Action Alert*, *Class Action Reports*, and CM/ECF or PACER. For each case, data were collected on the size of any partial settlements (*Partial Settlement*) and the aggregate settlement (*Total Settlement*). Data were also collected on the attorneys' fee request (*Fee Request*) and the fee award (*Fee*). These were measured both as a percentage of the partial settlement to which they were attributable and in inflation-adjusted 2005 dollars. The other settlement variables are: (1) whether securities in addition to common stock were alleged to be damaged (*Securities*); and (2) whether the settlement contained consideration other than cash (*Non-Cash*).[99]

Descriptive statistics for the dataset appear in Table 2.

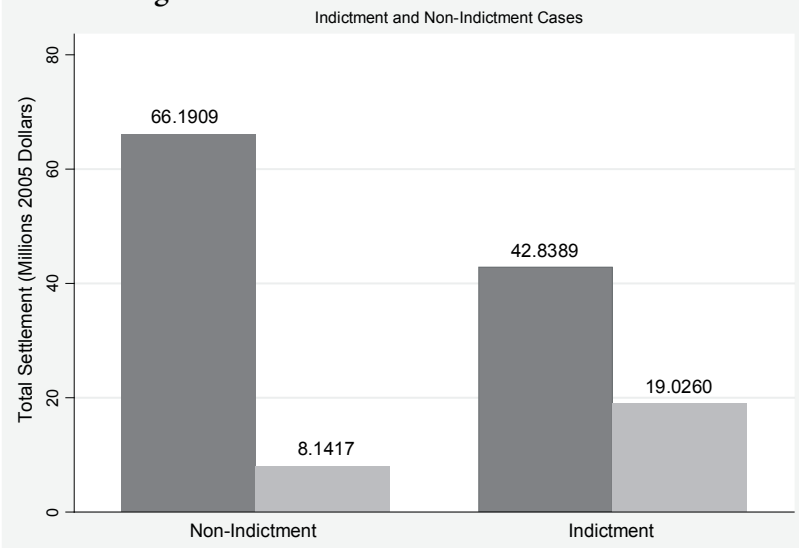
[99] Cornerstone Research, Post-Reform Act Securities Settlements 15 (2005).

V. Empirical Analysis

A. Are Settlement Amounts Higher in the Indictment Cases?

Figure 3 shows mean settlement amounts in the indictment and non-indictment cases. On average, settlements in the non-indictment cases were $66.2 million compared with $42.8 million for the indictment cases. These differences are not statistically significant. Both sub-samples contain outliers that substantially inflate the means. In fact, if one looks at median values instead of means, one observes precisely the opposite result. The median total settlement in the non-indictment cases is $8.1 million versus $19.0 million in the indictment cases. The difference in medians is statistically significant.[100]

Figure 3: Mean and Median Total Settlements



Of course, simple mean and median comparisons tell us very little about the impact of kickbacks on settlement amounts because they do not control for other factors that affect settlement size. To isolate whether paying kickbacks has a positive effect on settlement size, linear regressions were run using the log-transformed *Total Settlement* (in constant 2005 dollars) as the dependent variable. In addition to the controls discussed in Section IV, the regressions include either: (1) an indicator variable *Indictment* that takes a value of 1 if the case is one of the kickback cases alleged in the indictment and 0 otherwise; or (2) an indicator variable *Repeat* that takes a value of 1 if the case has a repeat, professional plaintiff. In the regressions, standard errors are clustered by circuit. Table 3 reports the results of this analysis.[101]

If plaintiffs receiving kickbacks had incentives to obtain higher settlements and were able to do so, then there should be a significant, positive relationship between settlement size and the *Indictment* variable. In other words, if Milberg Weiss is correct, then we should see, when controlling for other variables that affect settlement size, that settlements in the indictment cases were larger than settlements in other cases.

That, however, is not what the data show. In the first regression in Table 3, *Indictment* has a very small negative coefficient (-0.003), meaning that settlements in the indictment cases are less than 1% smaller than in the non-indictment cases. That difference, however, is statistically insignificant (probability = 0.986), meaning that the negative correlation may simply be the product of random variation in the sample. Model 2 substitutes *Repeat* for *Indictment* and finds a positive but still insignificant correlation.

The available evidence thus suggests no relationship between total settlements and the cases in which kickbacks were alleged to have been paid.[102] This finding is consistent with the hypothesis that these plaintiffs were

[100] A two-tailed t-test was used to compare the means. That test yielded a t statistic of 0.364 (probability = 0.728). The Mann-Whitney rank-sum test was used to compare the medians. The test yielded a z statistic of -2.742 (probability = 0.006).

[101] Although the regressions in Table 3 have both circuit and year fixed effects, those variables have been omitted from the Table for ease of presentation.

[102] To check the robustness of this result, several additional regressions were run. There are six settlements in the database that are in excess of $1 billion and which are significant outliers (*i.e.*, they were more than three standard deviations above the mean settlement amount for the sample). The indictment cases had a smaller average settlement (although the difference was not significant) than the non-indictment cases. Several years in the dataset had relatively few settlements.

To ensure that these differences were not biasing the results, the regressions were rerun using three restricted samples: (1) a sample that omitted settlements in excess of $1 billion; (2) a sample that omitted settlements in the top quartile of settlements; and (3) a sample that omitted settlements in the top half of settlements. Regressions were also run substituting four-year periods (with 1991-1994 as the reference category) for the individual year fixed effects. The *Indictment* variable remains insignificant throughout.

indeed simply figureheads whose only function was to give Milberg Weiss the plaintiffs they needed to allow the firm to file the action. The data do not support Milberg Weiss' claim that the plaintiffs in these cases were either capable of or willing to hold out for higher settlement amounts in order to maximize the class' recovery.

Looking at total settlement amounts is not the only metric for evaluating the quality of the recovery in a case. If plaintiffs receiving kickbacks hold out for larger settlements, then the ratio of settlement to total potential damages should also be larger. That is, these plaintiffs should be able to obtain a higher proportion of the stakes at issue in the case, all else being equal.

Table 3 also reports the results of regressions that test the relationship between kickbacks and the ratio of settlement to MDL. There is again no evidence that plaintiffs receiving kickbacks recovered more of the available stakes at issue than other plaintiffs. Models 4 and 5 test, respectively, the *Indictment* and *Repeat* variables. In both models the coefficients for these variables are negative but insignificant. These data, therefore, do not support the claim that plaintiffs in the indictment cases or in other cases involving repeat plaintiffs on average recovered more of the stakes at issue than plaintiffs in other cases.

It is worth noting that in the regressions in Table 3 there is a positive and significant correlation between the dependent variables and the presence of Milberg Weiss as a lead counsel in the case. This finding is consistent with past studies of the determinants of settlement amounts.[103] It is also a finding that Milberg Weiss uses to support its claim that absent class members in these cases were better off with Milberg Weiss as counsel, even if Milberg Weiss was paying kickbacks to clients. Put simply, the argument is that even if Milberg Weiss kicked back some of its fees to the lead plaintiff, the class was still better off because of the better results Milberg Weiss on average obtains.[104]

The primary problem with this argument is that neither this study nor any of the previous studies draw a causal link between Milberg Weiss' participation and higher settlement amounts; they only show that the two are

[103] *See, e.g.*, Cornerstone Research, Post-Reform Act Securities Settlements 18 (2005).

[104] *See Statement of Milberg Weiss Regarding Indictment—May 22, 2006* (http://www.milbergweiss.com/newsevents/publicationsdetail.aspx?pubtype=5280&pubid=774).

Table 3: Regressions for Settlement Size

	Total Settlement			Ratio Settlement to MDL		
	(1)	(2)	(3)	(4)	(5)	(6)
Indictment	-0.003		-0.096	-0.147		-0.305
	(0.02)		(0.62)	(0.94)		(3.27)**
Repeat		0.019			-0.021	
		(0.15)			(0.17)	
Milberg	0.342	0.340		0.396	0.387	
	(2.72)*	(2.75)*		(3.16)**	(3.13)**	
Public Pension	0.720	0.720	0.641	0.771	0.772	0.630
	(7.67)**	(7.67)**	(4.13)**	(7.77)**	(7.80)**	(4.19)**
MDL	0.262	0.262	0.218	-0.722	-0.723	-0.778
	(7.49)**	(7.58)**	(6.06)**	(29.58)**	(30.37)**	(23.65)**
Class Period	0.109	0.109	0.048	0.129	0.129	0.099
	(4.25)**	(4.24)**	(1.16)	(3.76)**	(3.77)**	(1.84)
Total Assets	0.163	0.163	0.120	0.151	0.152	0.103
	(5.18)**	(5.25)**	(3.60)**	(4.26)**	(4.35)**	(2.80)*
Bankruptcy	-0.288	-0.289	-0.339	-0.384	-0.390	-0.416
	(2.84)*	(2.77)*	(1.82)	(3.05)*	(3.00)*	(2.26)*
Gov't Action	0.161	0.160	0.152	0.055	0.053	0.091
	(2.40)*	(2.38)*	(1.21)	(0.71)	(0.67)	(0.48)
Restatement	0.299	0.300	0.124	0.195	0.201	0.119
	(3.04)*	(3.08)*	(0.76)	(1.86)	(1.94)	(0.66)
Accounting	-0.187	-0.187	0.013	-0.157	-0.162	-0.053
	(1.48)	(1.51)	(0.17)	(1.23)	(1.31)	(0.63)
High Profile	0.340	0.341	0.630	0.453	0.453	0.859
	(2.77)*	(2.76)*	(3.31)**	(3.00)*	(3.01)*	(4.31)**
Accountant	0.274	0.273	0.551	0.030	0.028	0.307
	(2.75)*	(2.73)*	(2.65)*	(0.25)	(0.23)	(2.02)
Underwriter	0.275	0.274	0.181	0.326	0.319	0.181
	(1.85)	(1.81)	(0.62)	(1.89)	(1.79)	(0.56)
Non-Cash	0.132	0.132	0.206	0.191	0.186	0.152
	(1.33)	(1.29)	(1.10)	(1.63)	(1.54)	(0.86)
Securities	0.408	0.408	0.493	0.307	0.307	0.467
	(3.48)**	(3.48)**	(7.05)**	(1.34)	(1.34)	(4.61)**
Docket Entries	0.659	0.658	0.570	0.598	0.595	0.589
	(13.15)**	(13.15)**	(8.86)**	(14.11)**	(14.41)**	(7.45)**
Constant	3.777	3.782	5.933	4.074	4.103	6.189
	(9.28)**	(9.16)**	(12.18)**	(11.47)**	(11.03)**	(8.88)**
Observations	674	674	341	674	674	341
R-squared	0.72	0.72	0.66	0.62	0.62	0.66

*significant at 5%; **significant at 1%

Note: All models contained circuit and year fixed effects, which have been omitted from the Table for ease of presentation. All models are for the full sample of cases except for Models 3 and 6, which are for the subset of Milberg cases. The regressions cluster standard errors by circuit with robust t statistics reported in parentheses. The dependent variables, *MDL*, *Total Assets*, and *Total Docket Entries* are log-transformed. All dollar figures are in constant 2005 dollars.

Sources: Institutional Shareholder Services, *Securities Class Action Database*; Stanford Law School, *Securities Class Action Clearinghouse*; CRSP; COMPUSTAT; CM/ECF; PACER; *Securities Class Action Alert*; *Class Action Reports*.

correlated. To be sure, it is possible that Milberg Weiss produces better results than other law firms, but other explanations are possible as well. The most likely one is that the cases in which Milberg Weiss participates are systematically of higher quality than cases run by other law firms and that the variables used in the regressions do not completely capture these differences.

There are reasons to believe that Milberg Weiss might be better able to identify and compete for the highest quality cases. The firm was for most of the period under study the largest of the plaintiffs' firms and thus possessed significant resources to investigate and prepare cases. Indeed, the firm regularly claims that it investigates cases thoroughly and that it has substantial experience identifying which cases to pursue. Moreover, the whole point of having professional plaintiffs was to give the firm a leg up in filing complaints quickly and obtaining the lead counsel position in the best cases. So it may well be that the average case Milberg Weiss pursues and obtains the lead counsel position in is of higher quality, thereby explaining the positive correlation. Or, to put it somewhat differently, it remains possible that if another law firm had this particular line-up of cases it may have achieved similar results.

While it is difficult to draw causal inferences concerning settlement amounts and Milberg Weiss' participation, we can test whether there are significant differences in outcomes in Milberg Weiss cases depending on whether or not the firm used a professional plaintiff. Models 3 and 6 re-run the regressions on just the sub-sample of Milberg Weiss cases. With respect to settlement amounts, *Indictment* is negative but insignificant (Model 3). By contrast, in Model 6 in which the dependent variable is the ratio of settlement to estimated damages, *Indictment* is negative and significant at 1%. While this finding suggests that recoveries were actually lower in the kickback cases compared to other Milberg Weiss cases, there is some evidence of a self-selection effect. Although not reported here, when *Repeat* is substituted for *Indictment*, the coefficient (-0.190) remains negative but is insignificant (probability = 0.259).

At bottom, these findings suggest only weak evidence of a connection between settlement amounts and kickbacks, although what evidence there is runs in the opposite direction of Milberg Weiss' claims. Recoveries may be lower in the kickback cases, not higher. Of course, given that this association appears in only one of six models and might be attributable to a self-selection bias, it seems safest to conclude that the available evidence does not support the existence of a relationship between kickbacks and recoveries. This conclusion makes sense when one considers the standard dynamics of securities class actions. Attorneys appear to control these actions with little or no input from the representative plaintiffs.[105] Attorneys quite naturally will try to maximize the value of these cases. Since this is almost exclusively a lawyer driven process, it is unreasonable to expect that financial arrangements between the attorney and the representative would make much if any difference.

The finding of no statistically significant association between the kickback cases and settlement amounts is only part of the story. The analysis here is based on gross recoveries, but absent class members' actual return is based on the net recovery after payment of attorneys' fees. If kickbacks affected neither recoveries nor fees, they would be benign. But, if fees were higher in the indictment cases, then the net result for the class would have been worse. Indeed, this is the thrust of the government's theory of harm in the case. It is to this question of the impact of kickbacks on fees that the paper now turns.

B. Are Fee Requests Higher in the Indictment Cases?

We start, as with the analysis of settlement amounts, with a comparison of the mean and median fee requests in the indictment and non-indictment cases. As shown in Figure 4, mean (median) fee requests in indictment cases were 31.83% (33.33%). By contrast, fee requests in the non-indictment cases were smaller, with a mean (median) of just 29.29% (30%). The difference in means and medians is significant at less than 5%, suggesting that smaller fee requests in the non-indictment cases are unlikely to be the product of chance.[106] There is also a significant difference in the distribution of fee requests. The standard deviation of fee requests in the

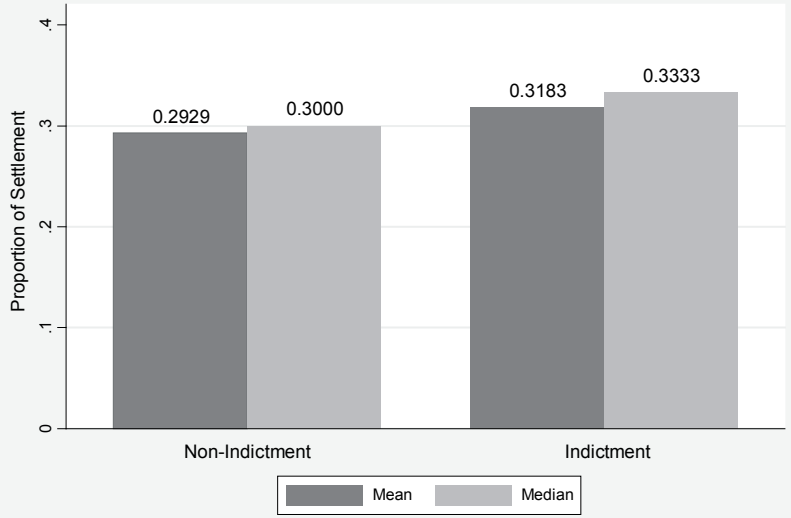
[105] The only exception seems to be cases in which large institutional investors have taken the lead plaintiff role.

[106] A two-tailed t-test was used to compare the means. That test yielded a t statistic of -2.452 (probability = 0.015). The Mann-Whitney rank-sum test was used to compare the medians. The test yielded a z statistic of -2.339 (probability = 0.019).

non-indictment cases is 5.8%, more than double the 2.5% standard deviation in the indictment cases.[107]

Together, these data show that the fee requests Milberg Weiss made in the indictment cases were in a much narrower and higher range than fee requests in other cases. This pattern is consistent with Milberg Weiss asking for fees in the indictment cases that were in a narrow band at or near the high end of what it might expect a court to award. It is also a pattern one might expect to see if a representative plaintiff was receiving a kickback that represented the majority of its potential return because in such a case both the representative plaintiff and the lawyer would have an incentive to maximize fees.[108]

Figure 4: Mean and Median Fee Requests



It is, of course, possible that these observed differences in fee requests might be due to changes in the pattern of fee requests over time rather than a product of the kickback scheme. Figure 5 shows box plots for the distribution of fee requests in the periods 1991-1998 and 1999-2007.[109] Figure 5

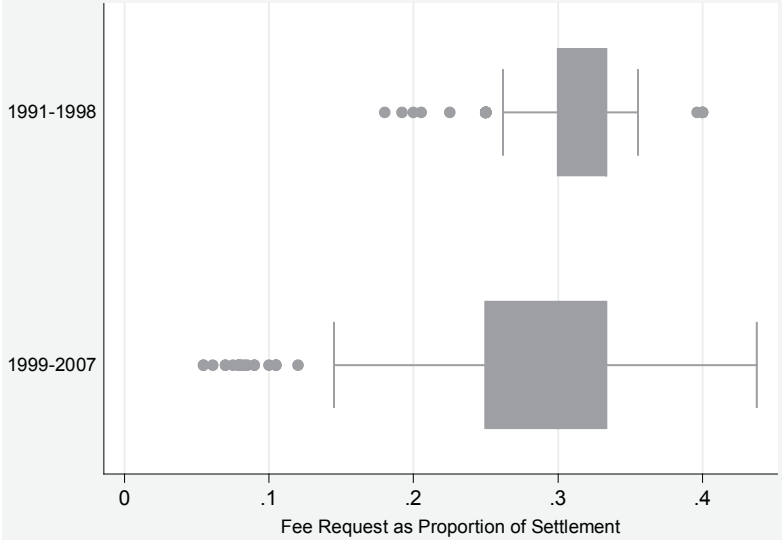
[107] A variance ratio test was used to determine whether this difference in standard deviations was significant. The test yielded an f statistic of 5.510 (probability = 0.000).

[108] *See supra* Section III(B).

[109] In a box plot, the box contains the central 50% of the distribution. The lines extending from the box are called whiskers and extend to maximum and minimum values, unless

shows a much narrower distribution of fees in the earlier period. It also shows no fee requests as low as the bottom range of fee requests seen in the later period. The greater downward variation of fee requests is likely the result of increased institutional investor participation in securities class actions, which has been shown to be negatively correlated with fee requests.[110]

Figure 5: Box Plot of Fee Requests Over Time



This change in the pattern of fee requests provides a potential alternative explanation for the observed differences in the indictment and non-indictment cases. It is relevant for another reason as well. The smaller variation in fee requests in the earlier period means it may be difficult to pinpoint whether fee requests in the indictment cases were in fact higher than in the non-indictment cases when other factors are held constant. Not only is there a small sample of indictment settlements for which fee request data is available (n=32), but nearly 90% of the indictment cases were in the period 1991-1998.

there are outliers, which are then marked by dots. Alan Agresti and barbara Finlay, Statistical Methods for the Social Sciences 63 (3d ed. 1997).

[110] Perino, *supra* note 67, at 28.

For this reason, in addition to comparing the fee requests in the indictment and non-indictment cases, it is also useful to compare the fee requests in cases where Milberg Weiss was lead counsel and cases in which it did not participate. As shown in Figure 6, mean fee requests in the Milberg Weiss cases were 30.02% versus 28.82% in other cases. Medians were identical. The difference in means is statistically significant.[111] We also see the same pattern in the standard deviation of fee requests that we saw in the indictment cases. The standard deviation of Milberg Weiss' fee requests is 4.66%, significantly less than the 6.55% standard deviation in the non-Milberg Weiss cases.[112] Thus, Milberg Weiss cases, like the subset of indictment cases, are characterized by higher fee requests with less variation than the requests of other firms.

Interestingly, within the subset of Milberg Weiss cases, there is a pronounced difference between its fee request behavior in the non-indictment versus indictment cases. Figure 7 shows this comparison. The mean and median fee requests in the non-indictment cases (29.83% and 30%, respectively) are significantly lower than the mean and median requests in the non-indictment cases (31.83% and 33.33%, respectively).[113] The standard deviation of Milberg Weiss' fee requests is more than twice as large in the non-indictment cases as in the indictment cases (5.8% versus 2.5%).[114] Milberg Weiss asked for consistently higher fees in the cases in which the government alleges it paid kickbacks.

How much are these differences in fee requests the product of the differences in average settlement size between the sub-samples of indictment and non-indictment cases? Past studies have shown that settlement size explains nearly 90% of the variations in fee awards.[115] As shown in Figure 8, a similar strong relationship exists between the log-transformed size of the settlement and the log-transformed size of the fee request (both of which are measured in constant 2005 dollars).

[111] The t statistic was -2.797 (probability = 0.005).
[112] A variance ratio test was used to determine whether this difference in standard deviations was significant. The test yielded an f statistic of 1.981 (probability = 0.000).
[113] In the t test, the t statistic was -2.452 (probability = 0.015). For the Mann-Whitney test, the z statistic was -2.339 (probability = 0.019).
[114] These differences are statistically significant (f = 5.510; probability = 0.000).
[115] Eisenberg & Miller, *supra* note 24, at 76; Perino, *supra* note 67, at 5 n.1.

Figure 6: Mean and Median Fee Requests

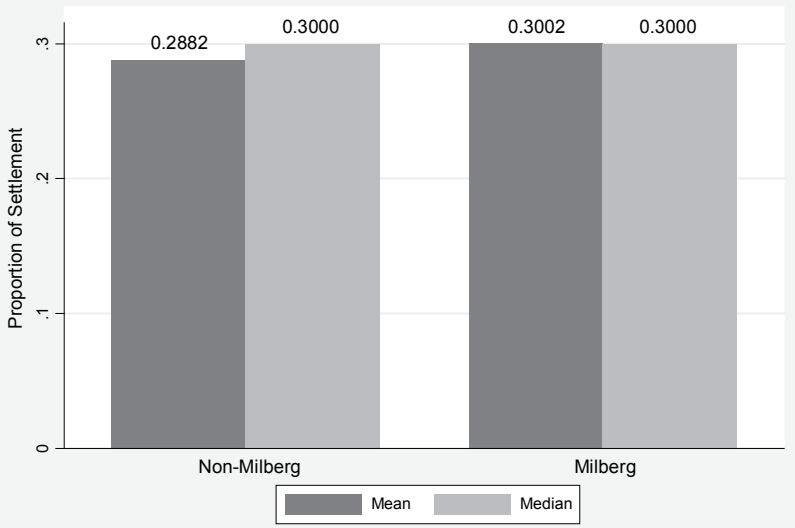


Figure 7: Milberg Weiss Mean and Median Fee Requests

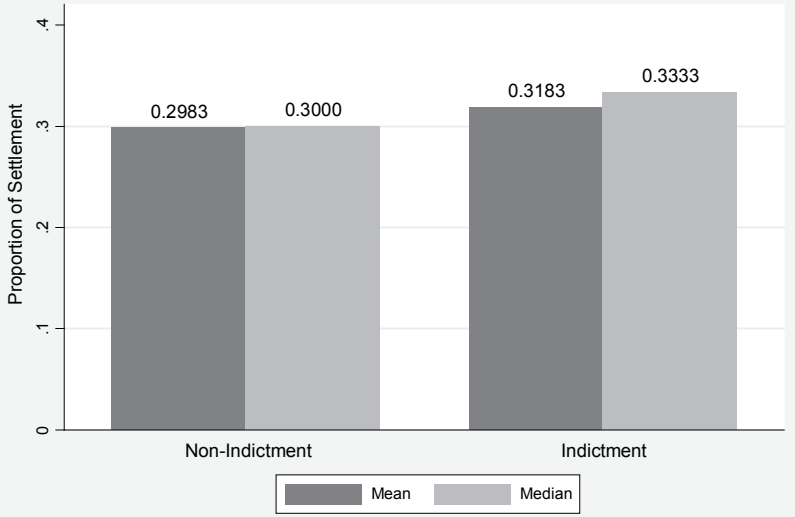


Figure 8A: Relationship Between Settlements and Fee Requests

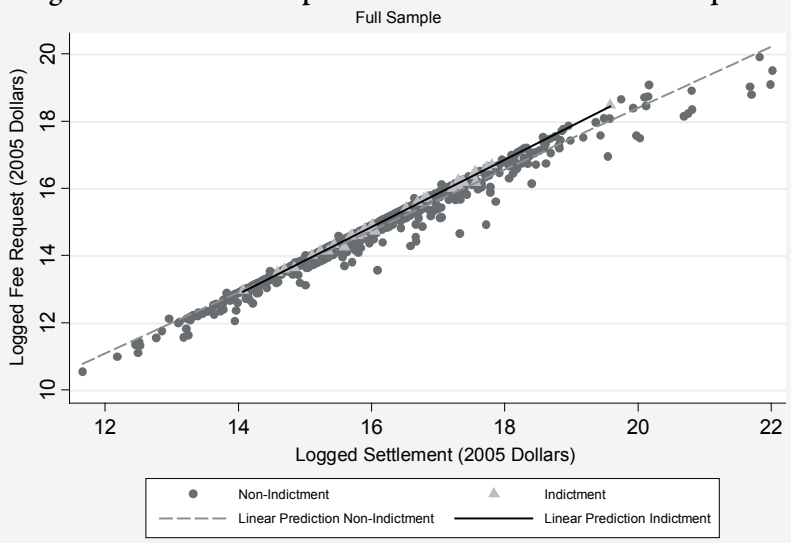
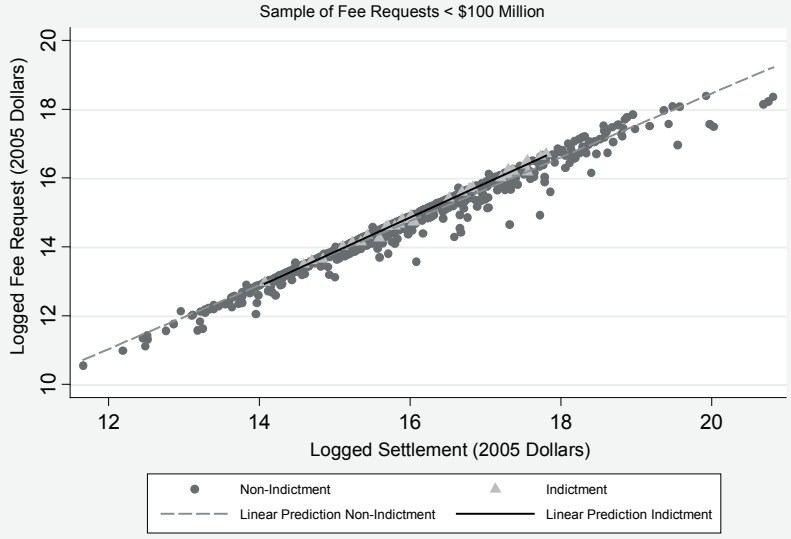


Figure 8B: Relationship Between Settlements and Fee Requests



Besides the strong relationship between settlement size and the size of the fee request, several features of Figure 8A are notable. First, consistent with the standard deviation data, there is little downward variation in the indictment cases as compared to the non-indictment cases. Most are clustered on top of the scatter plot, meaning that most are at the high end of fee requests given settlements of similar size. Second, the relationship between settlement size and fee requests does not appear to be constant in the indictment versus non-indictment cases. We can clearly see this in the two prediction lines in the figure. The dashed prediction line for the non-indictment cases is not as steep as the solid prediction line for the indictment cases. In other words, as settlement size increases, the fee requests in the indictment cases appear to grow increasing larger than the fee requests in the non-indictment cases.

To be sure, there is just one indictment case with a fee request in excess of $100 million (18.42 on the natural log scale). That fee request might be unduly influencing the prediction line. For this reason, Figure 8B omits fee requests over $100 million. Although the differential relationship between settlement and fee requests in the two sets of cases is less dramatic in Figure 8B, it remains.

To fully test the relationship between kickbacks and fee requests, we again need to rely on multiple regression analysis to control for the effect of other variables. The dependent variable in the regressions is either the log-transformed fee request (in constant 2005 dollars) or the fee request as a proportion of the settlement. The explanatory variables are settlement size and the other variables identified in Section IV that are correlated with fee requests. As with the regressions for settlement size, the regressions include year and circuit fixed effects (although these are unreported in the Table). Standard errors are clustered by circuit.

Table 4 reports the results of these regressions. Model 1 includes only an indicator variable *Indictment*. If fee requests are higher in the cases in which kickbacks were paid, then we should see a positive and significant correlation between the dependent variable and *Indictment*. *Indictment* is positive in Model 1 (0.053), but the correlation is insignificant (probability = 0.127). The *Milberg* variable (0.051) is significant at less than 10% (probability = 0.067). This suggests that, all else being equal, on average Milberg Weiss' fee requests were about 5% higher than those of other law firms.

Figures 8A and 8B suggested that the affect of *Indictment* was not uniform, but varied with settlement size. To test this, Model 2 contains an interaction term (*Indict_Settle*) that is the product of *Indictment* and *Settlement*. Both *Indictment* (-1.231) and the interaction term (0.078) are significant in Model 2, but again only at the 10% level.[116] While this might mean that there is in fact no relationship between these variables and fee requests, it is also possible that these relatively weak findings are simply the byproduct of the small sample of indictment cases and the small variation in fee requests.

To assess this possibility, Model 2 was re-run using a statistical technique called bootstrapping, which is frequently employed in such situations. In bootstrapping, repeated re-sampling of the distribution is used to generate the standard errors.[117] Using this technique, both *Indictment* (z = -2.49, probability = 0.013) and *Indict_Settle* (z = 2.53, probability = 0.011) were significant at conventional levels.

So what exactly do these coefficients mean? The negative coefficient on *Indictment* does not mean that fee requests were lower in indictment cases because the interpretation of the coefficient changes when an interaction term is included in the regression. *Indictment* now represents the effect of *Indictment* when the settlement amount is zero. The interpretation for the interaction term is that in the indictment cases a 1% change in the settlement amount yields a 0.08% larger increase in fee requests than in the non-indictment cases. In other words, there is significant evidence that as settlements grow larger the fee requests in indictment cases grow at a faster rate than the fee requests in the non-indictment cases. In Model 2, the *Milberg* variable (0.057) is positive and significant at the 10% level, although quite close to conventional levels of statistical significance (probability = 0.055).[118] This finding supports the hypothesis that Milberg Weiss asks for significantly higher fees than other law firms, even when holding constant the effects associated with the indictment cases.

[116] The probabilities for the two terms are 0.077 and 0.067.

[117] Christopher Z. Mooney and Robert D. Duval, Bootstrapping: A Nonparametric Approach to Statistical Inference 1 (Newbury Park, Calif.: Sage Publications 1993). Here, 5,000 replications were used.

[118] When Model 2 was run using bootstrapped standard errors the *Milberg* variable remained significant (z = 3.47, probability = 0.001).

Table 4: Regressions for Fee Requests Using *Indictment* Variable

	Logged Fee Request				Fee Request as Proportion of Settlement			
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Indictment	0.053	-1.231	-0.566	-0.788	0.014	-0.235	-0.122	-0.173
	(1.65)	(1.88)†	(3.26)**	(1.41)	(2.20)*	(2.02)†	(3.60)**	(1.51)
Milberg	0.051	0.053	0.041		0.011	0.011	0.010	
	(2.03)†	(2.14)†	(1.86)†		(1.84)†	(1.93)†	(1.71)	
Public Pension	-0.264	-0.262	-0.254	-0.179	-0.055	-0.055	-0.054	-0.037
	(5.34)**	(5.01)**	(5.79)**	(3.34)**	(7.32)**	(6.75)**	(7.39)**	(4.01)**
Settlement	0.971	0.968	0.973	0.988	-0.007	-0.007	-0.006	-0.003
	(69.42)**	(68.84)**	(77.58)**	(58.59)**	(2.40)*	(2.58)*	(2.48)*	(0.69)
Gov't Action	-0.003	-0.002	-0.013	0.010	-0.002	-0.002	-0.003	0.002
	(0.22)	(0.18)	(1.03)	(1.04)	(0.77)	(0.72)	(1.09)	(0.81)
High Profile	-0.106	-0.107	-0.102	-0.111	-0.013	-0.013	-0.014	-0.021
	(2.48)*	(2.65)*	(1.64)	(3.13)**	(1.55)	(1.71)	(1.27)	(3.00)*
Auction	-0.573	-0.566	-0.607	-0.533	-0.107	-0.106	-0.111	-0.113
	(6.29)**	(6.16)**	(6.51)**	(2.31)*	(5.87)**	(5.77)**	(5.48)**	(3.39)**
Docket Entries	-0.039	-0.038	-0.018	-0.014	-0.006	-0.006	-0.004	-0.003
	(2.52)*	(2.37)*	(0.91)	(0.78)	(1.98)†	(1.88)†	(1.11)	(0.88)
Experience	-0.474	-0.511	-0.356	-0.297	-0.059	-0.066	-0.048	-0.034
	(6.58)**	(6.77)**	(4.21)**	(1.21)	(2.82)*	(3.05)*	(2.63)*	(0.46)
Age	0.061	0.061	0.042	0.009	0.013	0.013	0.011	0.003
	(4.04)**	(3.97)**	(2.40)*	(0.40)	(4.02)**	(4.01)**	(3.23)**	(0.65)
Indict_Settle		0.078	0.037	0.049		0.015	0.008	0.011
		(1.95)†	(3.64)**	(1.39)		(2.16)†	(4.08)**	(1.48)
Constant	-0.757	-0.716	-0.896	-1.208	0.383	0.391	0.369	0.297
	(2.88)*	(2.69)*	(4.60)**	(4.50)**	(7.57)**	(7.73)**	(8.15)**	(4.55)**
Observations	716	716	704	350	716	716	704	350
R-squared	0.98	0.98	0.98	0.99	0.55	0.55	0.52	0.53

† significant at 10%; * significant at 5%; ** significant at 1%

Note: All models cluster standard errors by circuit with t statistics reported in parentheses. Models 1-4 use the log-transformed fee request measured in constant 2005 dollars as the dependent variable. Models 5-8 use the fee request as a proportion of the settlement as the dependent variable. As a robustness check, Models 3 and 7 omit fee requests in excess of $100 million. All models use year and circuit fixed effects, which have been omitted from the Table for ease of presentation. *Settlement*, *Docket Entries*, and *Age* are log-transformed. *Settlement* is in constant 2005 dollars.

Sources: Institutional Shareholder Services, *Securities Class Action Database*; Stanford Law School, *Securities Class Action Clearinghouse*; CRSP; COMPUSTAT; CM/ECF; PACER; *Securities Class Action Alert*; *Class Action Reports*.

Indeed, these findings fit nicely with the findings on settlements. Remember, that the analysis found that *Milberg* was positive and significant in those regressions. While that might be due to the higher quality of the cases in which Milberg Weiss participates, assume instead that, as Milberg Weiss contends, it is due to the superior results the firm obtains. If that were the case, it would not be surprising to see the firm asking for higher fees as a reward, hence the positive coefficient on the *Milberg* variable in the fee request regressions. But, the settlement regressions also found no statistically significant positive correlation associated with the indictment cases. Nonetheless, the firm still asked for increasingly higher fees as settlements increased even though there seems to be no basis for claiming superior results. This too is a finding that is consistent with the hypothesis that plaintiffs receiving kickbacks had incentives to allow attorneys to charge excessive fees.

As a robustness check to ensure that the cases with fee requests in excess of $100 million were not biasing the results, Model 3 re-runs the regression with these cases omitted. *Indictment* and the interaction term are now significant at less than 1% and *Milberg* is significant at less than 10%. Model 4 re-runs the regression containing the interaction term on the subset of Milberg Weiss cases and finds no statistically significant associations between fee requests and either *Indictment* or the interaction term.

Models 5 through 8 repeat these regressions; however, instead of measuring the fee request in logged dollars, the dependent variable is measured as a proportion of the settlement. The results are marginally stronger in these models. In Model 5, the *Indictment* variable is positive and significant at less than 5% while the *Milberg* variable is positive, but significant only at 10%. When the interaction term *Indict_Settle* is added in Model 6, *Indictment* and the interaction term are positive and significant at the 5% level. When the sample is restricted to fee requests of less than $100 million, *Indict_Settle* is positive and significant at less than 1%.[119]

As noted previously, exclusive reliance on the cases the government chose to allege in the indictment might introduce a self-selection bias into the analysis. To address this possibility, Table 5 re-runs the same regressions

[119] As with the regressions for settlements, to further check the robustness of these results regressions were run substituting four-year periods for individual year fixed effects. The results were substantially similar.

Table 5: Regressions for Fee Requests Using *Repeat* Variable

	Logged Fee Request				Fee Request as Proportion of Settlement			
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Repeat	0.014	-1.418	-0.783	-0.831	0.004	-0.301	-0.202	-0.190
	(0.61)	(2.01)†	(2.33)*	(1.55)	(0.48)	(2.09)†	(2.31)*	(1.74)
Milberg	0.054	0.055	0.044		0.012	0.012	0.010	
	(2.11)†	(2.28)*	(1.85)†		(1.90)†	(2.04)	(1.76)	
Public Pension	-0.263	-0.261	-0.242	-0.179	-0.055	-0.054	-0.053	-0.037
	(5.37)**	(4.98)**	(6.77)**	(3.37)**	(7.37)**	(6.65)**	(8.15)**	(4.05)**
Settlement	0.970	0.967	0.977	0.987	-0.007	-0.007	-0.006	-0.003
	(70.29)**	(69.10)**	(80.11)**	(57.32)**	(2.46)*	(2.70)*	(2.45)*	(0.72)
Gov't Action	-0.002	-0.000	-0.011	0.011	-0.002	-0.001	-0.003	0.003
	(0.22)	(0.00)	(0.98)	(1.12)	(0.76)	(0.52)	(1.00)	(0.86)
High Profile	-0.105	-0.107	-0.068	-0.110	-0.013	-0.013	-0.009	-0.021
	(2.45)*	(2.69)*	(0.93)	(3.11)**	(1.51)	(1.76)	(0.71)	(2.92)*
Auction	-0.574	-0.564	-0.622	-0.534	-0.108	-0.105	-0.113	-0.113
	(6.38)**	(6.19)**	(6.40)**	(2.32)*	(5.98)**	(5.83)**	(5.48)**	(3.39)**
Docket Entries	-0.038	-0.038	-0.022	-0.013	-0.006	-0.006	-0.004	-0.003
	(2.53)*	(2.40)*	(1.27)	(0.73)	(1.95)	(1.90)	(1.28)	(0.83)
Experience	-0.471	-0.507	-0.279	-0.295	-0.058	-0.066	-0.039	-0.033
	(6.69)**	(6.86)**	(3.06)*	(1.23)	(2.90)*	(3.11)**	(2.18)	(0.46)
Age	0.062	0.062	0.048	0.009	0.013	0.013	0.012	0.003
	(4.00)**	(3.97)**	(2.86)*	(0.41)	(3.95)**	(3.96)**	(3.39)**	(0.67)
Repeat_Settle		0.088	0.048	0.051		0.019	0.013	0.012
		(2.07)†	(2.47)*	(1.52)		(2.22)*	(2.53)*	(1.69)
Constant	-0.762	-0.705	-0.929	-1.201	0.382	0.394	0.366	0.299
	(2.94)*	(2.63)*	(4.52)**	(4.39)**	(7.74)**	(7.81)**	(8.07)**	(4.50)**
Observations	716	716	698	350	716	716	698	350
R-squared	0.98	0.98	0.98	0.99	0.55	0.56	0.49	0.53

† significant at 10%; *significant at 5%; **significant at 1%

Note: All models cluster standard errors by circuit with t statistics reported in parentheses. Models 1-4 use the log-transformed fee request measured in constant 2005 dollars as the dependent variable. Models 5-8 use the fee request as a proportion of the settlement as the dependent variable. As a robustness check, Models 3 and 7 omit fee requests in excess of $100 million. All models use year and circuit fixed effects, which have been omitted from the Table for ease of presentation. *Settlement*, *Docket Entries*, and *Age* are log-transformed. *Settlement* is in constant 2005 dollars.

Sources: Institutional Shareholder Services, *Securities Class Action Database*; Stanford Law School, *Securities Class Action Clearinghouse*; CRSP; COMPUSTAT; CM/ECF; PACER; *Securities Class Action Alert*; *Class Action Reports*.

using *Repeat* instead of *Indictment*. The results are substantially similar, suggesting that the correlation identified here—increasingly larger fee requests with increasing case size when repeat plaintiffs are present—is not simply a byproduct of the government's strategic pleading choices.

The presence of the significant interaction term in these models suggests that that the real harm from kickbacks likely came in the larger cases in which they were paid. This finding makes practical sense. In smaller cases, most fee requests tend to cluster in a very small range from 30% to 33.33% of the settlement. For example, in the dataset, the median settlement is $7.259 million. In cases at or below the median, fees averaged 30.99%, with a standard deviation of just 3.94%. Cases above the median by contrast had average fees of 27.82% and a standard deviation of 6.73%.

One-third acts as something of an outer boundary for fee requests in securities class actions.[120] An attorney asking for more than one-third would likely invite enhanced judicial scrutiny of its request. Consequently, because fee requests in small cases generally tend to be at or near the boundary legal norms set, attorneys have little ability to increase their fee. Larger cases, however, create obvious economies of scale, which is why fee percentages decline as settlements increase.[121] In these cases, attorneys paying kickbacks could attempt to ignore these economies of scale and ask for fees that are at the high end of plausible requests, although still within the one-third norm. The evidence is consistent with this account. As settlements became larger, Milberg Weiss had more leeway in fee requests and seems to have used this flexibility to ask for fees that were consistently at the top of the permissible range.

[120] *See* Eisenberg, & Miller, *supra* note 24 at 77; Willging, *supra* note 77, at 10 (noting that fee award "infrequently exceeded the traditional 33.3% contingency fee rate"). One-third was not always the outer limit. Historically it apparently was not uncommon to see contingency fees that were as high as 50% of any award or settlement, particularly outside of class actions in the personal injury context. *See* Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. Rev. 29, 105-07 (1989).

[121] Eisenberg & Miller, *supra* note 24, at 78.

C. Are Fee Awards Higher in the Indictment Cases?

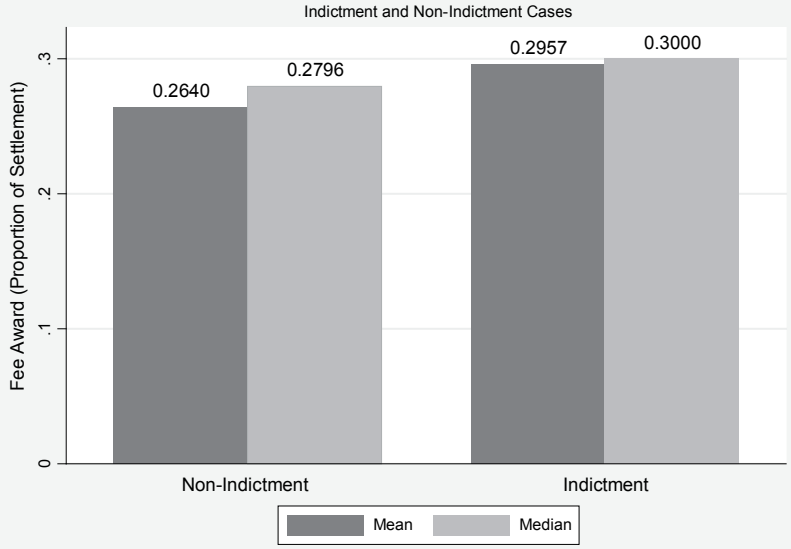
The previous section showed that, all else being equal, Milberg Weiss asked for significantly higher fees and that as settlement size increased, its fee requests increased at a faster rate in the indictment cases. High fee requests are a necessary but insufficient condition for harm to the class. After all, an excessive fee request will not harm absent class members so long as *ex post* judging is effective in reducing such requests. For this reason, this section examines the fees courts actually awarded in the indictment and non-indictment cases. The findings are quite similar to those on fee requests.

Figures 9 through 11 show mean and median fee awards for all cases in the database for which fee information was available. While awards are generally lower than requests (suggesting that at least some judges reduce fee requests) they otherwise demonstrate the same pattern. Figure 9 shows that mean (29.57%) and median (30%) fee awards in the indictment cases are higher than the mean (26.40%) and median (27.96%) fee awards in the non-indictment cases. These differences in means and medians are statistically significant at approximately the 1% level.[122] There is also significantly more variation in the fee awards in the non-indictment cases—the standard deviation of awards in those cases (6.84%) is more than double the standard deviation in the indictment cases (3.08%).[123] This is precisely the same pattern observed with fee requests—the indictment cases have significantly higher fees that fall within a narrower range than the non-indictment cases.

[122] In the t test used to compare means, the t statistic was -2.730 (probability = 0.007). The Mann-Whitney rank-sum test was used to compare the medians. The test yielded a z statistic of -2.588 (probability = 0.010).

[123] The f statistic in the variance ratio test is 4.926 (probability = 0.000).

Figure 9: Mean and Median Fee Awards



The similarities do not stop there. As with fee requests, Figure 10 shows that mean and median fee awards in the Milberg Weiss cases (27.05% and 29.99%) are significantly higher than in the non-Milberg Weiss cases (26.09% and 27.65%), although only the difference in means approaches traditional levels of statistical significance (probability = 0.061). Standard deviations are significantly lower (5.99% versus 7.35%) in the Milberg Weiss cases.[124] Figure 11 shows significant differences within the subset of Milberg Weiss cases. As was observed with fee requests, mean and median fee awards in the indictment cases (29.57% and 30%) were significantly higher than in other Milberg Weiss cases (26.76% and 28%).[125] The standard deviation was significantly smaller in the indictment cases than for Milberg Weiss' other cases (3.08% versus 6.18%).[126] In short, although awards are a bit lower than requests in all of these comparisons, the overall pattern remains otherwise identical.

[124] The f statistic in the variance ratio test is 1.503 (probability = 0.000). There is no statistically significant difference between the median fee awards in the Milberg Weiss versus non-Milberg Weiss cases.

[125] In the t test used to compare means, the t statistic was -2.655 (probability = 0.008). The Mann-Whitney rank-sum test was used to compare the medians. The test yielded a z statistic of -2.506 (probability = 0.012).

[126] The f statistic in the variance ratio test is 4.017 (probability = 0.000).

Figure 10: Mean and Median Fee Awards

Figure 11: Milberg Weiss Mean and Median Fee Awards

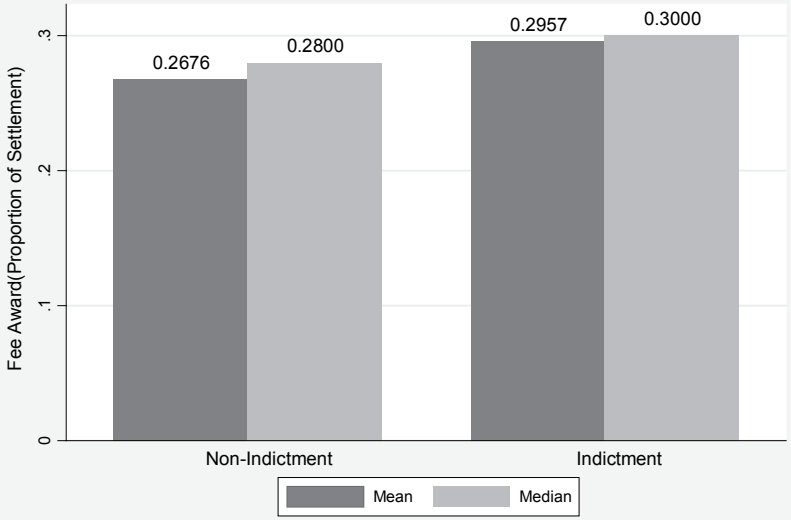


Figure 12A: Relationship Between Settlements and Fee Awards

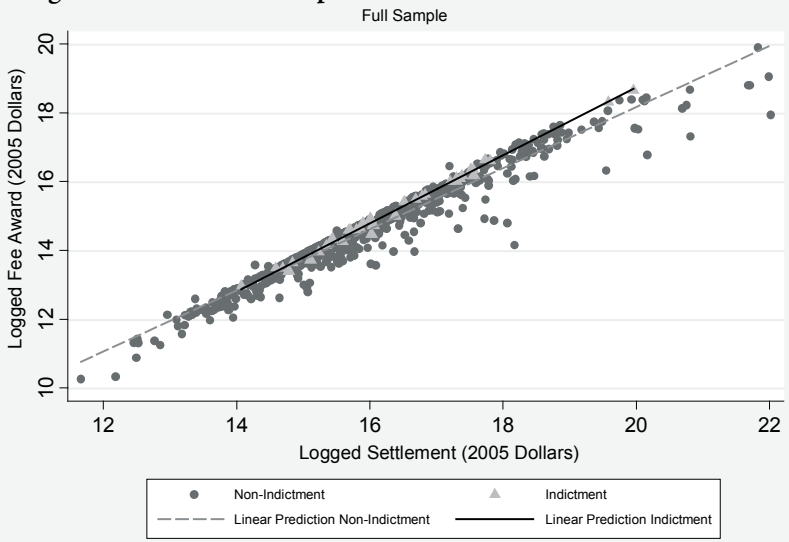
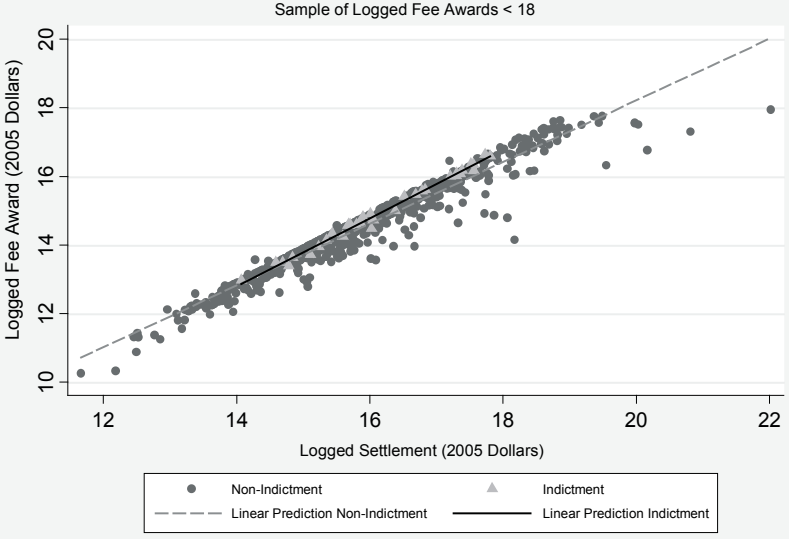


Figure 12B: Relationship Between Settlements and Fee Awards



The cases in the database also demonstrate the same strong linear relationship between settlements and fee awards when both are measured on a logarithmic scale. Figures 12A and 12B not only show this relationship, they also suggest that the effect of settlement size varies between the indictment and non-indictment cases. As with fee requests, the dashed prediction line for the non-indictment cases has a shallower slope than the solid prediction line for the indictment cases. In other words, settlement size seems to have a stronger effect in reducing fee awards in the non-indictment cases than in the indictment cases. To insure that the two very large fees in the indictment cases were not unduly influencing the slope of the prediction line, Figure 12B omits fee awards in excess of 18 on the log scale (approximately $65.7 million). As with fee requests, the differential impact of settlement size on fee awards persists in the sub-sample.

To fully test the relationship between kickbacks and fee awards, linear regressions were run using fee award as the dependent variable. These regressions contained the same variables used to test fee requests. As was done in Section V(B), the regressions use either the log-transformed fee award (in constant 2005 dollars) or the fee award as a proportion of the settlement. These regressions also include year and circuit fixed effects (although these are unreported in the Table). Standard errors are again clustered by circuit.

Table 6 reports the results of the regressions that use the *Indictment* variable. These results are marginally stronger than for the regressions on fee requests, but otherwise reveal a pattern that is quite similar to the pattern of fee requests. Model 1 includes only an indicator variable for *Indictment* (0.143), which is positive and significant at less than 10% (probability = 0.071). *Milberg* (0.041) is also positive and significant at less than 10% (probability = 0.090).

Models 2 and 3 include the *Indict_Settle* interaction term. In Model 2, which is for the full sample, the interaction term (0.102) is statistically significant (probability = 0.001). In the indictment cases, a 1% change in the settlement amount yields a 0.10% larger increase in fee awards than in the non-indictment cases. In other words, as settlements grow larger the fee awards in the indictment cases grow at a faster rate than the fee awards in the non-indictment cases, precisely the same relationship that was observed with respect to fee requests. These higher fees were obtained even though

Table 6: Regressions for Fee Awards Using *Indictment* Variable

	Logged Fee Award				Fee Award as Proportion of Settlement			
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Indictment	0.143	-1.538	-0.883	-1.056	0.026	-0.247	-0.145	-0.217
	(2.00)†	(4.24)**	(2.21)*	(8.95)**	(2.37)*	(4.03)**	(1.98)†	(6.66)**
Milberg	0.041	0.042	0.046		0.009	0.009	0.009	
	(1.86)†	(1.99)†	(2.26)*		(1.86)†	(1.97)†	(2.02)†	
Public Pension	-0.193	-0.187	-0.162	-0.082	-0.034	-0.033	-0.032	-0.015
	(5.42)**	(4.61)**	(6.14)**	(1.87)†	(7.02)**	(6.13)**	(6.18)**	(1.87)†
Settlement	0.936	0.932	0.950	0.929	-0.012	-0.012	-0.010	-0.013
	(28.95)**	(29.99)**	(34.65)**	(23.88)**	(2.27)*	(2.54)*	(2.22)*	(1.93)†
Gov't Action	-0.003	-0.002	0.002	-0.020	-0.003	-0.003	-0.002	-0.004
	(0.12)	(0.09)	(0.08)	(1.00)	(0.55)	(0.52)	(0.40)	(0.74)
High Profile	-0.138	-0.136	-0.110	-0.078	-0.017	-0.016	-0.016	-0.015
	(2.61)*	(2.75)*	(1.69)	(1.95)†	(1.96)†	(2.06)†	(1.60)	(1.60)
Auction	-0.580	-0.571	-0.517	-0.404	-0.090	-0.088	-0.090	-0.082
	(6.35)**	(6.38)**	(5.60)**	(1.39)	(5.71)**	(5.73)**	(4.42)**	(1.78)
Docket Entries	-0.036	-0.039	-0.023	0.002	-0.004	-0.005	-0.004	-0.001
	(1.30)	(1.27)	(0.79)	(0.05)	(0.98)	(0.97)	(0.99)	(0.22)
Experience	-0.482	-0.501	-0.391	-0.238	-0.036	-0.039	-0.033	-0.033
	(8.04)**	(7.75)**	(4.03)**	(0.57)	(1.26)	(1.44)	(1.22)	(0.42)
Age	0.105	0.109	0.102	-0.026	0.022	0.023	0.023	0.003
	(4.32)**	(4.72)**	(7.09)**	(0.38)	(5.96)**	(7.14)**	(7.32)**	(0.30)
Indict_Settle		0.102	0.059	0.075		0.017	0.010	0.015
		(4.31)**	(2.56)*	(9.24)**		(4.89)**	(2.51)*	(9.96)**
Constant	-0.411	-0.335	-0.680	-0.508	0.416	0.429	0.388	0.418
	(0.90)	(0.77)	(1.81)†	(0.98)	(5.74)**	(6.45)**	(5.96)**	(4.46)**
Observations	700	700	672	338	700	700	672	338
R-squared	0.96	0.96	0.96	0.96	0.38	0.38	0.31	0.37

† significant at 10%; *significant at 5%; **significant at 1%

Note: All models cluster standard errors by circuit with t statistics reported in parentheses. Models 1-4 use the log-transformed fee award measured in constant 2005 dollars as the dependent variable. Models 5-8 use the fee award as a proportion of the settlement as the dependent variable. As a robustness check, Models 3 and 7 omit logged fee awards in excess of 18. All models use year and circuit fixed effects, which have been omitted from the Table for ease of presentation. *Settlement*, *Docket Entries*, and *Age* are log-transformed. *Settlement* is in constant 2005 dollars.

Sources: Institutional Shareholder Services, *Securities Class Action Database*; Stanford Law School, *Securities Class Action Clearinghouse*; CRSP; COMPUSTAT; CM/ECF; PACER; *Securities Class Action Alert*; *Class Action Reports*.

Table 7: Regressions for Fee Awards Using *Repeat* Variable

	Logged Fee Award				Fee Award as Proportion of Settlement			
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Repeat	0.060	-1.548	-0.954	-1.009	0.009	-0.250	-0.178	-0.193
	(0.83)	(2.92)*	(1.92)†	(8.39)**	(0.86)	(2.72)*	(1.68)	(7.15)**
Milberg	0.046	0.048	0.053		0.010	0.010	0.011	
	(2.30)*	(2.42)*	(2.89)*		(2.24)*	(2.36)*	(2.51)*	
Public Pension	-0.192	-0.185	-0.163	-0.080	-0.034	-0.033	-0.032	-0.015
	(5.54)**	(4.71)**	(6.23)**	(1.89)†	(7.14)**	(6.27)**	(6.23)**	(1.78)
Settlement	0.935	0.930	0.950	0.926	-0.012	-0.013	-0.010	-0.013
	(28.94)**	(29.55)**	(34.40)**	(23.05)**	(2.30)*	(2.54)*	(2.23)*	(1.91)†
Gov't Action	-0.002	0.000	0.004	-0.020	-0.003	-0.002	-0.002	-0.004
	(0.10)	(0.01)	(0.18)	(0.95)	(0.54)	(0.43)	(0.30)	(0.70)
High Profile	-0.136	-0.134	-0.110	-0.071	-0.016	-0.016	-0.016	-0.014
	(2.50)*	(2.69)*	(1.68)	(1.84)†	(1.87)†	(2.01)†	(1.59)	(1.50)
Auction	-0.583	-0.572	-0.521	-0.406	-0.090	-0.089	-0.091	-0.083
	(6.29)**	(6.32)**	(5.36)**	(1.38)	(5.54)**	(5.48)**	(4.28)**	(1.76)
Docket Entries	-0.032	-0.037	-0.021	0.007	-0.003	-0.004	-0.004	-0.001
	(1.20)	(1.28)	(0.79)	(0.18)	(0.86)	(0.95)	(0.96)	(0.09)
Experience	-0.474	-0.491	-0.379	-0.269	-0.034	-0.037	-0.031	-0.037
	(8.18)**	(7.78)**	(4.11)**	(0.62)	(1.20)	(1.38)	(1.20)	(0.47)
Age	0.105	0.111	0.105	-0.028	0.022	0.023	0.023	0.003
	(4.33)**	(4.90)**	(6.94)**	(0.37)	(6.23)**	(7.68)**	(7.57)**	(0.24)
Repeat_Settle		0.099	0.058	0.069		0.016	0.011	0.013
		(2.85)*	(1.99)†	(5.77)**		(2.93)*	(1.85)†	(8.71)**
Constant	-0.426	-0.333	-0.694	-0.495	0.413	0.428	0.385	0.418
	(0.90)	(0.73)	(1.75)	(0.89)	(5.60)**	(6.10)**	(5.65)**	(4.21)**
Observations	700	700	672	338	700	700	672	338
R-squared	0.96	0.96	0.96	0.96	0.38	0.38	0.31	0.36

† significant at 10%; *significant at 5%; **significant at 1%

Note: All models cluster standard errors by circuit with t statistics reported in parentheses. Models 1-4 use the log-transformed fee award measured in constant 2005 dollars as the dependent variable. Models 5-8 use the fee award as a proportion of the settlement as the dependent variable. As a robustness check, Models 3 and 7 omit logged fee awards in excess of 18. All models use year and circuit fixed effects, which have been omitted from the Table for ease of presentation. *Settlement*, *Docket Entries*, and *Age* are log-transformed. *Settlement* is in constant 2005 dollars.

Sources: Institutional Shareholder Services, *Securities Class Action Database*; Stanford Law School, *Securities Class Action Clearinghouse*; CRSP; COMPUSTAT; CM/ECF; PACER; *Securities Class Action Alert*; *Class Action Reports*.

Indictment had no discernable positive impact on recoveries.[127] In Model 3, which omits very large fee awards, the interaction term (0.059) remains positive and significant (probability = 0.027). The results are substantially consistent for Models 5 through 7, which measure the fee award as a percentage of the settlement.[128] Likewise, Table 7 substitutes *Repeat* for *Indictment* with consistent results.[129]

One important difference between the regressions for fee requests and the regressions for fee awards lies in the regressions run on the sub-sample of Milberg Weiss cases (Models 4 and 8). Recall that in the regressions for fee requests *Indictment* and the interaction term were insignificant. Here, by contrast, both variables are significant. Thus, as with the full sample, as settlement size increased, Milberg Weiss was awarded an increasingly larger share of the settlement in the indictment cases than in other cases it handled. The same significant results appear in Table 7 when *Repeat* is substituted for *Indictment*.

This evidence contradicts Milberg Weiss' claim that paying kickbacks was a victimless crime. The positive and significant correlation between fee awards and the *Milberg* variable shows that, all else equal, Milberg Weiss obtained fees that were on average between 4% and 5% higher than the fees other firms obtained. While it is possible that these extra fees were rewards for superior performance, there was no statistically significant correlation between recoveries and the indictment cases. Nonetheless, as settlement size increased, fees in the indictment cases grew at a faster rate than fees in the non-indictment cases. The same interaction with settlement size was observed in the subset of Milberg Weiss cases as well as in the cases with repeat professional plaintiffs. These results are consistent with the hypothesis that that absent class members were in fact harmed in the indictment cases—they appear to have received a lower proportion of the settlement proceeds than class members in otherwise substantially similar non-indictment cases.

[127] *See supra* Section V(A).

[128] As a further robustness check, the models were re-run substituting four-year periods for the individual year fixed effects. Results were substantially the same as in the reported models.

[129] In Model 3 in Table 7 *Repeat* and the interaction term are significant at 10%. When bootstrapped standard errors are calculated these variables are significant at nearly the 5% level. The probability for *Repeat* equals 0.058. For the interaction term, the probability equals 0.064.

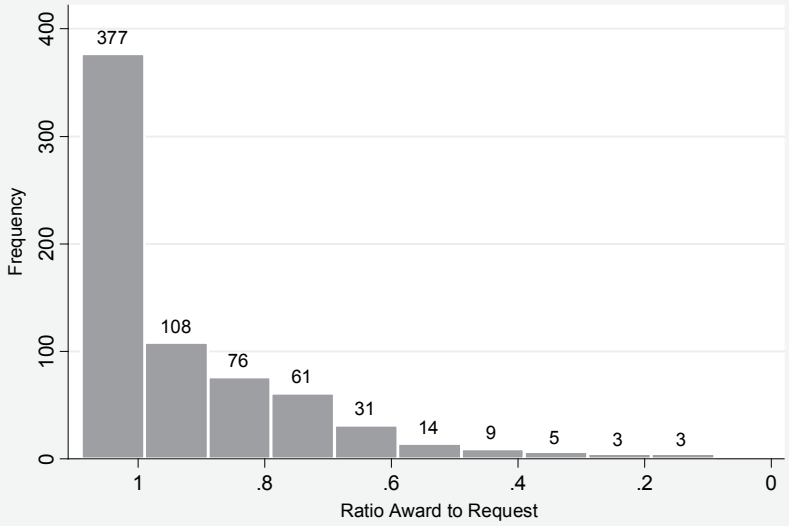
D. Do Judges Reduce Excessive Fee Requests?

Milberg Weiss argues that it could not have obtained excessive fees even if it wanted to because the judges who ultimately must approve fee awards would have cut back any fee request that was excessive. The analysis in the previous two sections suggests that this claim is simply incorrect—average fee requests and fee awards were higher in the indictment cases than in the non-indictment cases. Additional support for this conclusion comes from examining aggregate data on how vigorously judges monitor attorney fee requests.

One measure of the scrutiny that judges give these requests is the ratio of fee award to the fee request. A value of 1 would indicate that the judge awarded the plaintiffs' attorneys exactly what they had requested whereas a value of 0.5 would indicate that the judges gave the attorney only half of what they asked for. Figure 13 shows the distribution of these ratios in the sample and shows, quite strikingly, that judges do not aggressively reduce fee requests. In more than half the cases, judges award plaintiffs' attorneys precisely the fee they requested. When judges do award less than what was requested, those downward departures tend to be quite small. On average, judges awarded plaintiffs' attorneys 90% of the fees they requested.

Of course, it remains possible that the judges in the indictment cases reduced fee requests more than average. Figure 14 shows the mean and median ratios for the indictment cases as compared to the remainder of the sample. The ratio of award to request is actually higher in the indictment cases than in the remainder of the sample. On average, the lawyers in the indictment cases received 94.25% of the fee they requested compared to only 89.94% for the remainder of the sample. While these differences are not statistically significant, they undermine any claim that judges were more aggressive in lowering fees in the indictment cases.

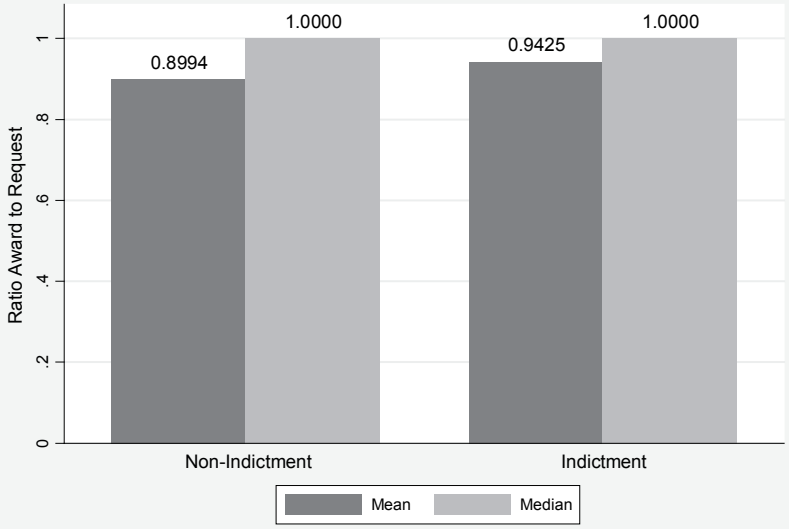
Figure 13: Distribution of Ratio of Award to Request



Note: Based on 687 cases for which data on both fee award and fee request are available.

Figure 14: Ratio Award to Request

Indictment and Non-Indictment Cases



VI. Conclusion

Milberg Weiss and other commentators argue that the indictment of the firm and two of its former partners for paying kickbacks to named plaintiffs in securities class actions was unwarranted because the absent class members in those cases were not harmed by these payments. This paper provides ample evidence that contradicts this contention. While recoveries in the indictment cases are statistically indistinguishable from recoveries in the non-indictment cases, there are substantial differences in fee requests and fee awards.

Simple means comparisons showed that: (1) average fee requests in the indictment cases were significantly higher than average fee requests in the non-indictment cases; (2) Milberg Weiss' average fee requests were significantly larger than the fee requests of other plaintiffs' law firms; and (3) within the subset of Milberg Weiss cases, the firm on average asked for significantly higher fees in the indictment cases than in the non-indictment cases. Using linear regression analysis, the paper then found that, all else being equal, Milberg Weiss asks for fees that are on average about 5% higher than the requests of other law firms. The more noteworthy finding is that the impact of the *Indictment* variable is not uniform across cases but instead varies with the size of the settlement. As settlements grew larger, the fee requests in the indictment cases grew at a faster rate than the fee requests in the non-indictment cases, which means that on average Milberg Weiss asked for an increasingly greater share of the settlements it obtained even though there is no evidence that it obtained superior results.

The overall pattern of fee awards is substantially similar. Average fees in the indictment cases were significantly higher than in the non-indictment cases. Milberg Weiss' fee awards were significantly higher than the fee awards to other firms and within the subset of Milberg Weiss cases, average awards were higher in the indictment cases versus the non-indictment cases. The results of the regression analysis of fee awards likewise mirror those of fee requests. Cases in which Milberg Weiss was lead counsel have fee awards that are on average between 4% and 5% higher than the awards in cases in which other firms serve in that role. The effect of the *Indictment*

variable was not constant across cases but instead has a greater impact as settlement size increases.

These findings cast doubt on Milberg Weiss' claim that paying kickbacks was a completely victimless crime. They are consistent with the hypothesis that Milberg Weiss asked for and got a greater share of the settlements in these cases than it otherwise would—a real economic harm to the class members who therefore would have had a lower net recovery.

About the Author

Michael A. Perino is currently the Dean George W. Matheson Professor of Law at St. John's University School of Law in New York. Professor Perino's primary areas of scholarly interest are securities regulation and litigation, corporations, and judicial decision-making. Professor Perino has also been a Visiting Professor at Cornell Law School (2005), the Justin W. D'Atri Visiting Professor of Law, Business and Society at Columbia Law School (2002), and a Lecturer and Co-Director of the Roberts Program in Law, Business, and Corporate Governance at Stanford Law School (1995-1998).

Professor Perino has authored numerous articles on securities regulation, securities fraud, and class action litigation. Congress relied on the empirical findings of his article *Fraud and Federalism: Preempting Private State Securities Fraud Causes of* Action, 50 Stanford Law Review 273 (1998), in enacting the Securities Litigation Uniform Standards Act of 1998. He is the author of the leading treatise on the Private Securities Litigation Reform Act, *Securities Litigation After the Reform Act* (CCH 2000). He has testified in both the United States Senate and the House of Representatives and is frequently quoted in the media on securities and corporate matters. The SEC has retained Professor Perino to provide it with a report and recommendations on the adequacy of arbitrator conflict disclosure requirements in securities arbitration. Professor Perino was also one of the principal developers of Stanford Law School's Securities Class Action Clearinghouse.

Professor Perino received his LL.M. degree from Columbia Law School, where he was valedictorian, a James Kent Scholar, and the recipient of the Walter Gellhorn Prize for outstanding proficiency in legal studies. He received his J.D. from Boston College Law School, where he was elected to the Order of the Coif.

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