

TRENDS IN SECURITIES CLASS ACTION SETTLEMENTS

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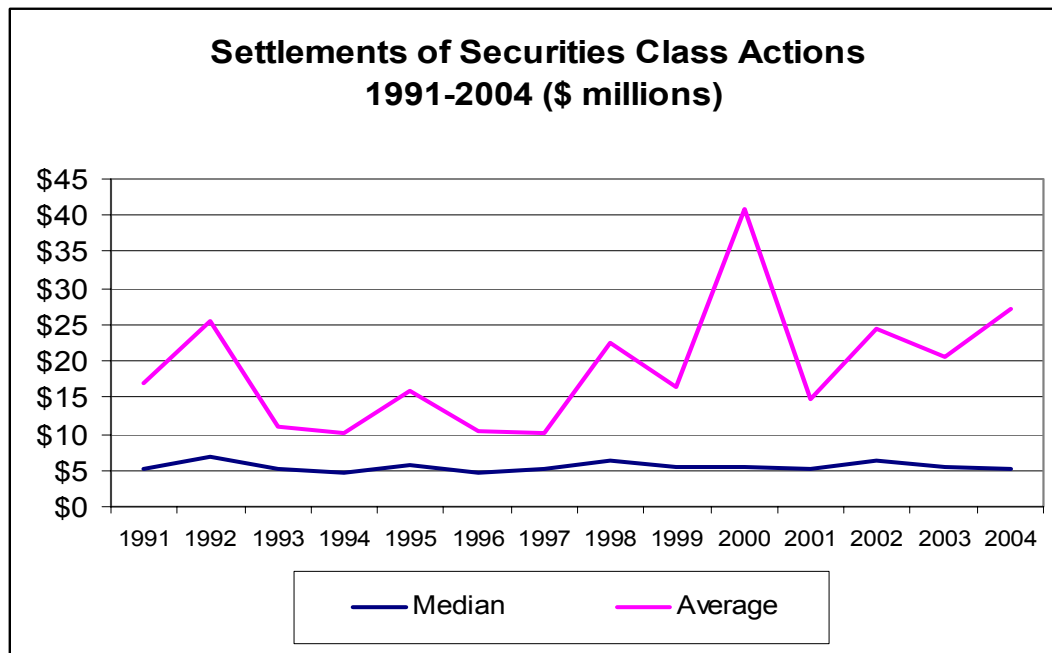
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In the wake of Enron and WorldCom, the increasing number of “mega settlements” over the \$100 million mark raises a question: are class action settlements really out of control? As George Santayana noted a century ago, “[t]hose who cannot remember the past are condemned to repeat it.” Thus, to obtain insight beyond the headlines of the financial press requires probing deeper into settlement figures over the last several years.

Trends in securities class action settlements over the last dozen years reveal the following:

- “Mega” securities settlements over \$100 million are on the rise.
- Average securities settlements, therefore, are also on the rise.
- Median settlement figures, however, have remained relatively stable since 1991.

Average settlements increased from \$20.7 in 2003 to \$27.1 in 2004 – an increase of 33%.¹ In stark contrast, the median settlement for 2004 was \$5.3 – a 5% *decrease* from the \$5.6 mean settlement of 2003. Perhaps most startling, the 2004 median settlement was exactly the same in 2004 as it was in 1991 when adjusting for inflation. The contrast between the average settlement and the median can be viewed graphically below:



One quickly draws the conclusion that, while the typical securities case (represented by the median settlement figure) has not increased risks for D&O insurers over the last decade, there is

clearly a new phenomenon beginning in 2000 with the Cendant settlement of \$3.5 billion that is having a dramatic effect on average settlement figures.

All of the top ten securities class action settlements have taken place since the year 2000, including three reached in connection with the *WorldCom* litigation alone.

Rank	Company	Year	Settlement Value (\$ millions)
1	Cendant Corp.	2000	\$3,528
2	WorldCom, Inc./Citigroup	2004	\$2,575
3	WorldCom, Inc./J.P Morgan	2005	\$2,000
4	McKesson	2005	\$960
5	Lucent	2003	\$517
6	Bank of America	2002	\$490
7	WorldCom, Inc./Bank of America	2005	\$460.5
8	Raytheon Co.	2004	\$460
9	Waste Management II	2002	\$457
10	Global Crossing	2004	\$325

In 2004, there were several settlements in excess of \$100 million (most of them securities settlements)ⁱⁱ and the trend has continued in 2005.ⁱⁱⁱ

In one of the more striking findings by NERA, over a 5-year period, the average public corporation faces a 10% probability that it will face at least one shareholder class action lawsuit based on historical filing rates (federal filings of securities class action lawsuits have ranged between 200 to 280 lawsuits per year since 1992).^{iv}

Taking all this information together, we can surmise that the risk of “mega” settlements has substantially increased since 2000. Coupled with a 10% risk of suit for the average public company on a 5-year risk horizon, there are real risks of potential losses that will exhaust certain insurance programs. With “mega” settlements over \$100 million, there is no “safe” layer on the stack.

That said, “mega” settlements, while more common today than 5 years ago, are still rare. Most cases, as the median settlement figures indicate, settle in the \$5 million to \$6 million range. Therefore, for the vast majority of claims, the risk of D&O losses are still within the manageable range. But historical trends do indicate the potential for ongoing “mega” settlements for some years to come.

ⁱ Buckberg, et al., *Recent Trends in Shareholder Class Action Litigation: Bear Market Cases Bring Big Settlements*, NERA Economic Consulting, February 2005, p 1.

ⁱⁱ Securities Litigation Settlements Over \$100 Million For 2004

Worldcom (Citigroup): \$2.575 billion

Raytheon: \$460 million

Global Crossing: \$325 million

Computer Associates: \$225 million
Charter Communications: \$144 million
Symbol Technologies: \$102 million
AT&T: \$100 million
Honeywell: \$100 million

This list does not include the dozens of regulatory settlements with the SEC, NASD and the New York Attorney General's office concerning the mutual fund scandal and other regulatory settlements in 2004.

iii Securities Litigation Settlements Over \$100 Million For 2005

WorldCom, Inc./J.P. Morgan: \$2 billion
McKesson: \$960 million
WorldCom, Inc./Bank of America: \$460.5 million
TXU: \$150 million
Deutsche Telecom: \$120 million

iv This does not include the year 1996, which saw a decrease in federal filings after the passage of the Private Securities Litigation Reform Act of 1995, when litigants flooded into state court to avoid the new pleading standards. It also excludes the 303 laddering claims filed in 2001.