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Looking Closer At A Record Year For Securities Cases

By **Stefan Boettrich** (February 21, 2018, 10:58 AM EST)

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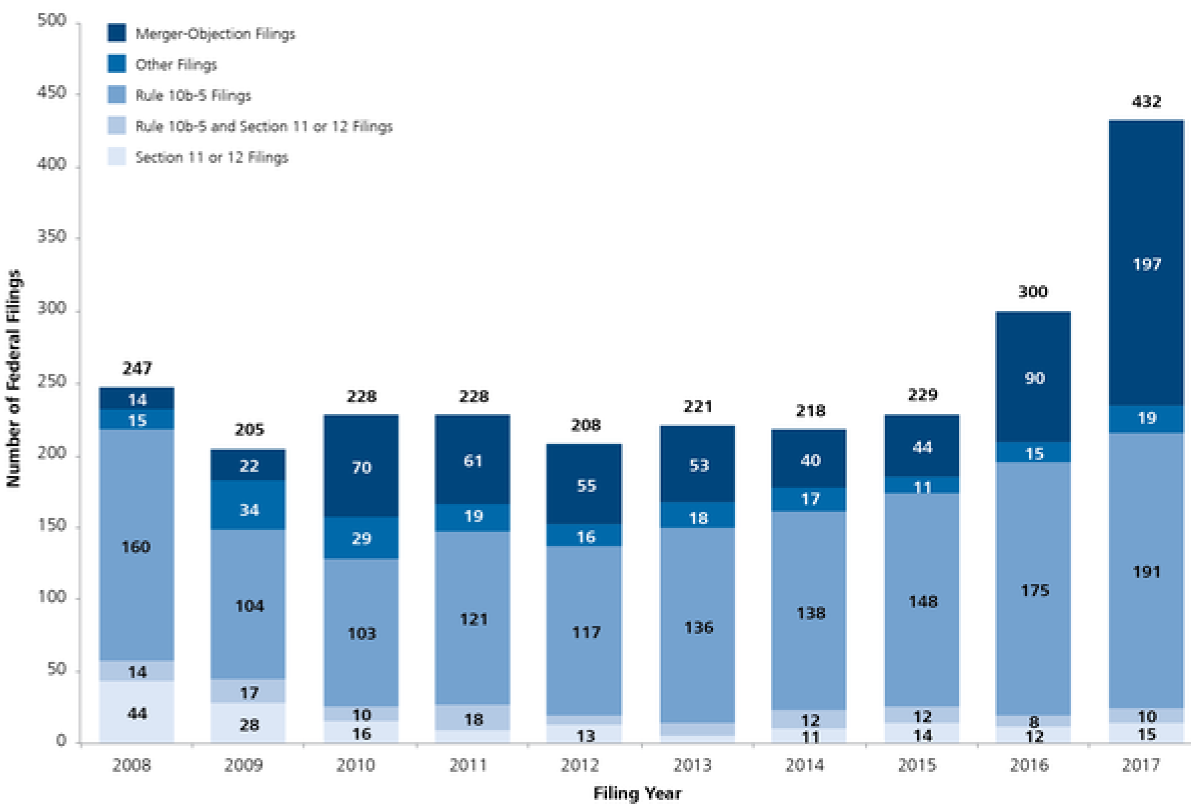
Securities class actions kept federal courts busy in 2017, as the pace of filings, settlements and dismissals each reached levels not seen in at least a decade. Filings were up 44 percent to 432, notching a third consecutive year of growth, while dismissals and settlements each grew by more than 30 percent. Growth in filings and resolutions was driven by an explosion of federal merger objection cases that commenced in early 2016 following the Trulia decision in the Delaware Court of Chancery.[1]

Filings of what have historically been more “standard” securities class actions — those alleging violations of U.S. Securities and Exchange Commission Rule 10b-5, or Section 11 or Section 12 of the Securities Act of 1933 — grew for a record fifth straight year in 2017 to 216 (see figure 1). Of those, 90 were filed in the first quarter of the year. Standard case growth was driven by filings targeting foreign companies (most of which were European or Chinese) and those alleging regulatory violations.

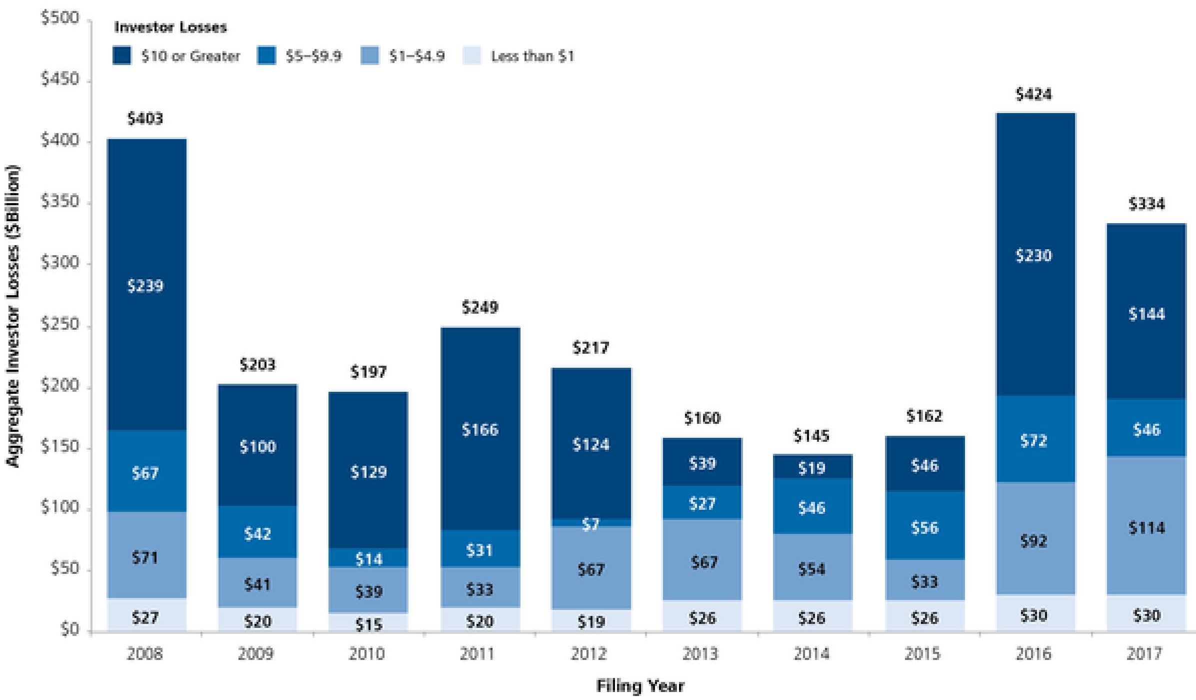
Figure 1. **Federal Filings by Type**
January 2008–December 2017



Aggregate Case Size Elevated for a Second Consecutive Year

In 2017, the total size of filed cases, as measured by NERA-defined investor losses, was elevated for a second consecutive year, and totaled $334 billion (see figure 2). Growth in case size over the last few years was primarily driven by filings alleging regulatory violations; over 2016 and 2017, such claims accounted for $325 billion in investor losses (43 percent of the total), compared with $79 billion (26 percent of the total) over 2014 and 2015.

Figure 2. **Aggregate NERA-Defined Investor Losses ($Billion)**
Shareholder Class Actions with Alleged Violations of Rule 10b-5, Section 11, or Section 12
January 2008–December 2017



Not only have more standard filings alleged regulatory violations, but such cases have become larger. Median NERA-defined investor losses for filings alleging such violations increased from $250 million over 2014-2015 to $1.05 billion over the 2016-2017 period.

In 2017, regulatory allegations have become broader in scope and affected more industries compared with the previous year. In 2016, the two economic sectors with the most regulatory filings accounted for 63 percent of such claims (and 59 percent of NERA-defined investor losses). In 2017, along with a jump in filings and total investor losses, the two sectors most subject to filings accounted for less than 40 percent of claims (and 16 percent of investor losses). The largest regulatory cases of 2017 included allegations related to safety recalls, emissions defeat devices, customer account creation and antitrust violations.

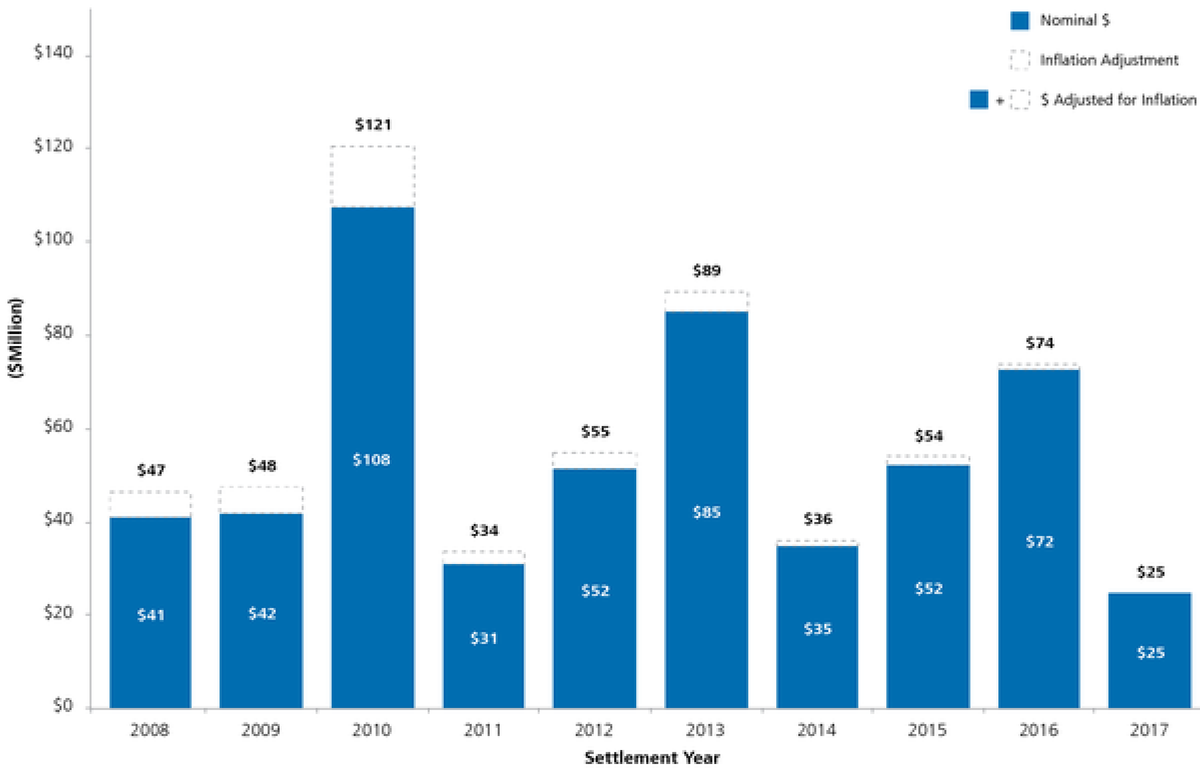
Dramatic Decline in Settlement Values

Three hundred and fifty-three securities class actions were resolved in 2017, a post-Private Securities Litigation Reform Act high driven by more than a 40 percent spike in dismissals and a 30 percent increase in settlements across all case types. As with filings, case resolution counts were affected by the recent surge in federal merger-objection litigation. Although the run-up in merger objection filings only commenced in early 2016, such cases tend to be resolved more than four times faster than standard cases, and such filings are already affecting case resolution statistics.

In 2017, 80 standard cases settled out of more than 500 that were active during the year. Despite an increase in the number of active cases versus 2016, the number of settlements dropped toward the post-PSLRA lows seen in 2012 and 2013.

Settlement values also declined across a variety of measures to levels not seen since the early 2000s (after adjusting for inflation). In 2017, the average settlement dropped to about $25 million, contrasting starkly with the $72 million average settlement in 2016 and the yearly growth preceding that (see figure 3). Even excluding the $1.6 billion and $1.1 billion settlements in 2016 involving Household International Inc. and Merck & Co., respectively, the average settlement in 2017 was down over 43 percent. This was driven by a complete lack of even moderately sized settlements; for the first time since 1998, no case settled for more than $250 million.

Figure 3. **Average Settlement Value ($Million)**
Excluding Merger-Objection Cases, IPO Laddering Cases, and Settlements for $0 Payment to the Class
January 2008–December 2017



The aggregate value of settlements in 2017 was about $1.8 billion, more than 70 percent less than 2016 and at a level not seen since 2001. This dramatic decline reflects both the drop in the number of settlements and the near-record low average settlement value. Resultantly, aggregate plaintiffs attorneys' fees and expenses declined by about 65 percent. While dramatic, the percent decline is less than the 70 percent decline in aggregate settlements, as most settled litigation was smaller, and smaller cases generally have higher fee payout ratios.

In 2017, for the second consecutive year (and the second year since the PSLRA became law), more cases were dismissed than settled. Surprisingly, this was true even excluding merger objections (which tend to be dismissed at a higher rate). Merger objections aside, 116 cases were dismissed in 2017, a high over the last decade. The adverse number of dismissals in 2017 was partially due to 41 voluntary dismissals, which was 50 percent more than the next highest yearly count. In particular, 32 cases were voluntarily dismissed without prejudice in 2017 (up from only two in 2016), which may ultimately result in them being refiled.

2018 is Already Looking Up

2018 kicked off with a flurry of filing and settlement activity. A total of 43 securities class actions were filed in January 2018. This was nearly 20 percent higher than the 2017 average monthly filing rate and approached the most active month during 2017, in which 49 cases were filed (a 16-year high).

The 43 cases filed in January consisted of a record 24 merger objections and 18 standard cases.[2] The record number of merger objections indicates that steady monthly growth in federal merger objection filings has persisted into 2018. Filings of standard cases were down from January of 2017, but in line with the long-term average filing rate of about 17 per month.

The aggregate value of settled litigation in January 2018 far exceeded the 2017 full-year total, primarily due to the $2.95 billion tentative settlement of Petroleo Brasileiro SA, or Petrobras. Additionally, the $290 million tentative settlement of litigation against Allergan Inc. exceeded the highest settlement value in 2017.

As indicated by early 2018 tentative settlements, the record low settlement metrics in 2017 do not necessarily portend low aggregate settlements in 2018 and beyond. In fact, aggregate NERA-defined investor losses of pending cases, a factor that has historically been significantly correlated with settlement amounts, increased for the second consecutive year and exceeded $900 billion as of Dec. 31, 2017.

Higher future standard case settlement values may be in the offing, as average NERA-defined investor losses of pending standard cases increased for the second consecutive year to $2.1 billion. Moreover, since about 38 percent of standard cases are resolved within two years (and 60 percent within three years), a subset of the large regulatory cases filed in 2016 and 2017 are likely to be resolved in coming years.

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[1] In re Trulia Inc. Stockholder Litigation, C.A. No. 10020-CB (Del. Ch. Jan. 22, 2016), n. 36.

[2] One case was filed that was neither a standard case nor a merger objection case.
