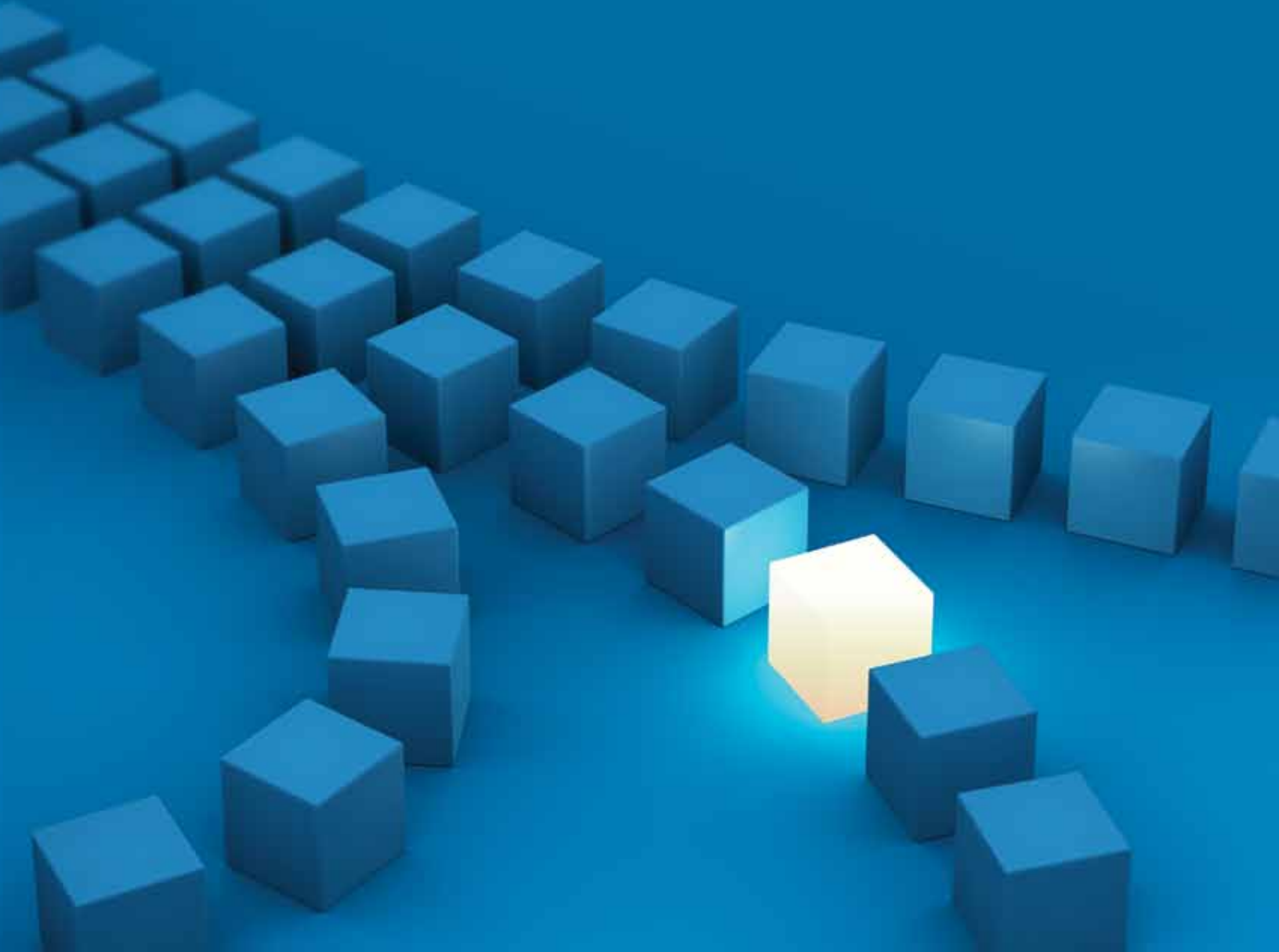




# **Trends 2010 Year-End Update:** Securities Class Action Filings Accelerate in Second Half of 2010; Median Settlement Value at an All-Time High

By Dr. Jordan Milev, Robert Patton, and Svetlana Starykh

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By Dr. Jordan Milev, Robert Patton, and Svetlana Starykh\*

14 December 2010

### Introduction

After slowing down during the first half of 2010, the pace of US federal securities class action filings has picked up substantially, and the number of filings this year is on track to exceed last year's total. The pace of credit crisis-related filings has continued to be markedly slower than in 2008 and early 2009, but that effect has been offset by an increase in other types of filings.

This upturn in filings does not appear to reflect a particular overriding trend, and has included suits filed against a variety of companies and involving a number of different types of allegations. Filings in 2010<sup>1</sup> have targeted companies in the finance sector (with more than half of filings against finance sector companies apparently unrelated to the credit crisis), the health technology sector, and the electronic technology and technology services sector. The second half of 2010 also witnessed nine filings against for-profit education companies, stemming from a US government investigation into marketing practices by these entities.

Cases filed in 2010 most frequently alleged undisclosed product and operational defects (which included alleged defects relating to both financial and non-financial products) and breach of fiduciary duty (generally relating to mergers and acquisitions). Ten cases were filed against companies domiciled in the People's Republic of China, most alleging accounting improprieties and/or ineffective internal controls.

The Ninth Circuit led the Second Circuit by a wide margin in the number of filings, a break with the pattern of the previous several years. In 2010, the Ninth Circuit had 26% more filings than the Second Circuit. Excluding filings of credit crisis-related and Ponzi scheme cases, the Ninth Circuit had an even greater lead.

Securities class actions this year are being filed more quickly. The median time from the end of the class period to the filing of a case plummeted to about a month for cases filed this year compared with nearly six months for cases filed in the second half of 2009.

Securities class action trials are rare, and verdicts in these trials rarer still; however, there were two verdicts delivered in 2010: one in plaintiffs' favor in a class action against BankAtlantic Bancorp, Inc., and a mixed verdict (company liable, individual defendants not liable) in a class action against Vivendi, S.A. Moreover, an earlier verdict in plaintiffs' favor in a class action against Apollo Group, Inc. was restored on appeal.

The median value for cases settled in 2010 was at an all-time high. With a median settlement of \$11.1 million, 2010 is the first year ever in which the typical settlement exceeds \$10 million.

One factor driving this jump in the size of the median settlement appears to be a record high in the median value of investor losses, a variable that serves as a proxy for the size of a case and correlates highly with settlement amount.<sup>2</sup> Median investor losses for cases settled in 2010 were \$604 million, more than 50% higher than in any year since the enactment of the Private Securities Litigation Reform Act (PSLRA) in 1995.

Median investor losses for cases *filed* in 2010 are down to pre-credit crisis levels and well below their recent highs in 2008 and 2009. Looking ahead, this suggests that the size of the median settlement may decline once the wave of credit crisis litigation is resolved.

## Trends in Filings

The pace of federal securities class action filings accelerated in the second half of 2010. Indeed, the 123 filings in the five months from July 1 through November 30, 2010 already substantially exceed the 96 filings in the first half of 2010.<sup>3</sup> From January through November 2010, there have been a total of 219 filings; at this pace, we project an additional 20 filings by year's end, or 239 in all. See Figure 1. That would be an increase over last year's 220 and would be broadly consistent with the long-term average.

In our 2010 mid-year study we observed that a decline in credit crisis-related litigation was being offset by an increase in other types of filings.<sup>4</sup> In the second half of 2010, this trend became even stronger. Securities class actions stemming from the global credit crisis have continued to be filed at a considerably slower rate than observed in 2008 and the first half of 2009. There have

Figure 1. **Federal Filings**  
January 1996 – November 2010

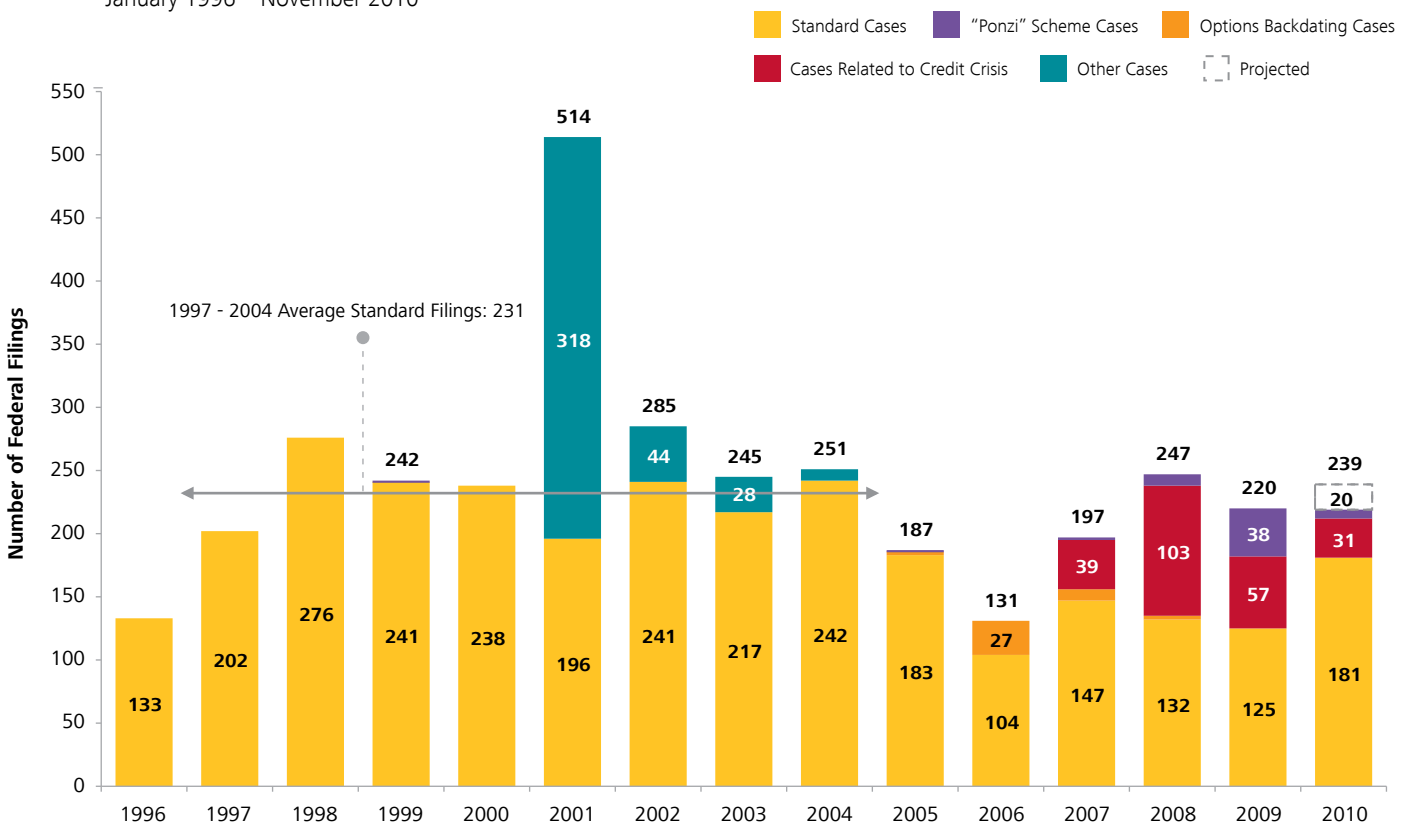
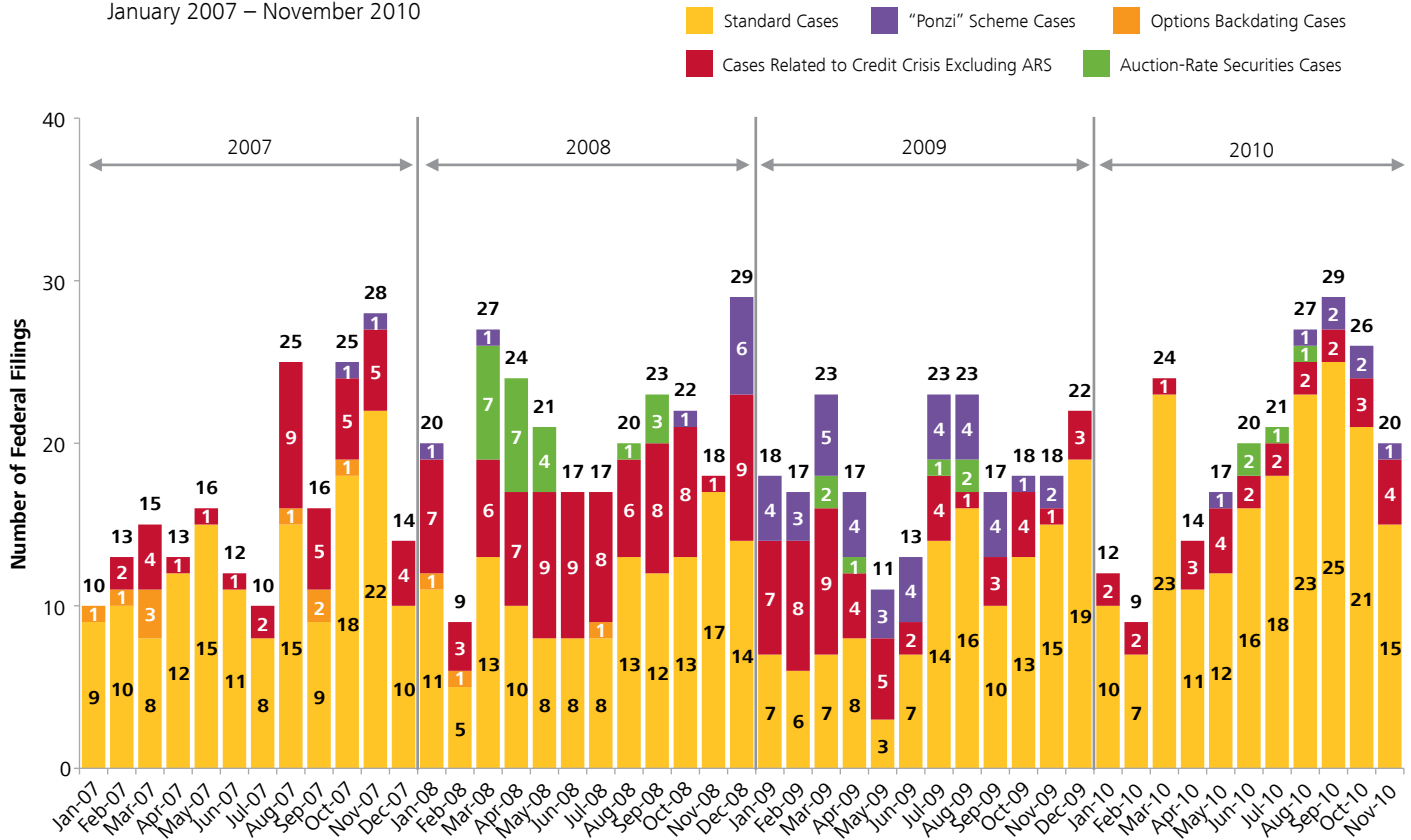


Figure 2. **Federal Filings: One-Month Intervals**  
January 2007 – November 2010



been only 31 such cases filed so far in 2010, as compared to 57 filed last year and 103 in 2008.<sup>5</sup> Ponzi scheme litigation, which produced 38 filings in 2009, produced only seven filings in 2010.

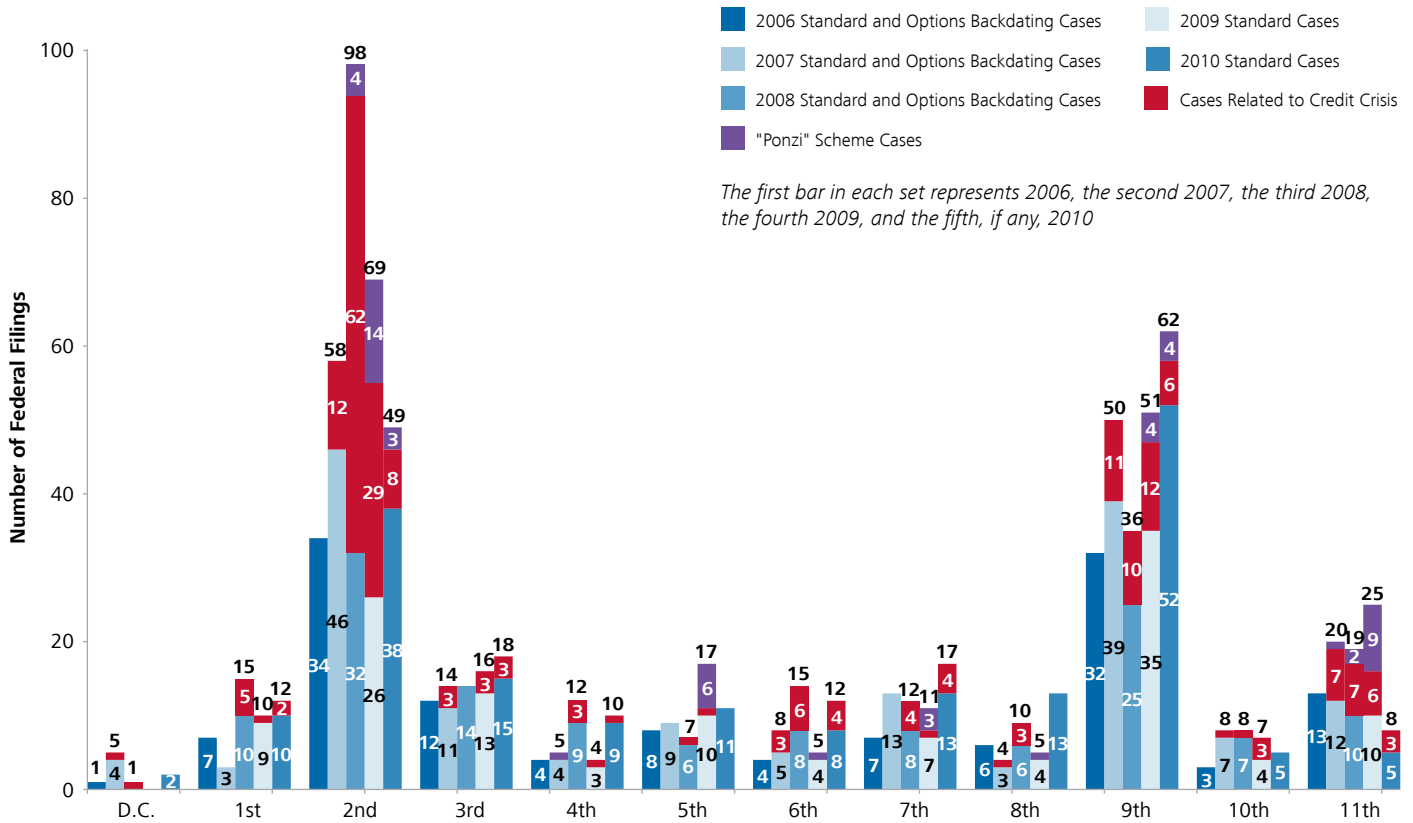
At the same time, “standard filings”—which exclude filings related to the credit crisis, Ponzi schemes, and certain other categories of special interest—have already been filed in greater number through the end of November than in any year since 2005.<sup>6</sup> Figures 1 and 2 break out standard filings from other types of cases.

Recent filings include cases targeting companies in the health technology, electronic technology and technology services, and finance sectors. More than half of filings against finance sector companies appear to have been unrelated to the credit crisis. In the second half of 2010, nine securities class actions were filed against for-profit education companies, stemming from an investigation by the US Government Accountability Office into marketing practices by these entities.

Figure 2 shows securities class action filings on a monthly basis. Filings rose steadily from only 14 in April to 29 in September, driven primarily by an increase in standard filings. The 25 standard filings in September exceeded those in any month since August 2004. Filings in October and November were somewhat lower than in the peak month of September. As Figure 2 shows, however, there is substantial variability in monthly filings and caution should be exercised in inferring trends from changes in the monthly filings numbers.

# In 2010, the Ninth Circuit has had 26% more filings than the Second Circuit.

Figure 3. **Federal Filings by Circuit, Year, and Type of Case**  
January 2006 – November 2010



## Filings by Circuit

In our mid-year study, we noted that the Second Circuit (which encompasses New York, Connecticut, and Vermont) had had the most filings among the 12 US circuits in each year from 2006 to 2009, but that the Ninth Circuit (encompassing California and certain other Western states and territories) had edged it out in the first half of 2010. This trend became more pronounced in the second half of 2010. From the beginning of the year through the end of November, the Ninth Circuit had 62 filings, 26% more than the 49 cases filed in the Second Circuit.

While the Second Circuit and Ninth Circuit had roughly the same number of credit crisis or Ponzi scheme cases (11 in the Second Circuit; 10 in the Ninth), other types of cases were filed at a much greater rate in the Ninth Circuit, which had 52 standard filings, 37% more than the 38 standard filings in the Second Circuit.

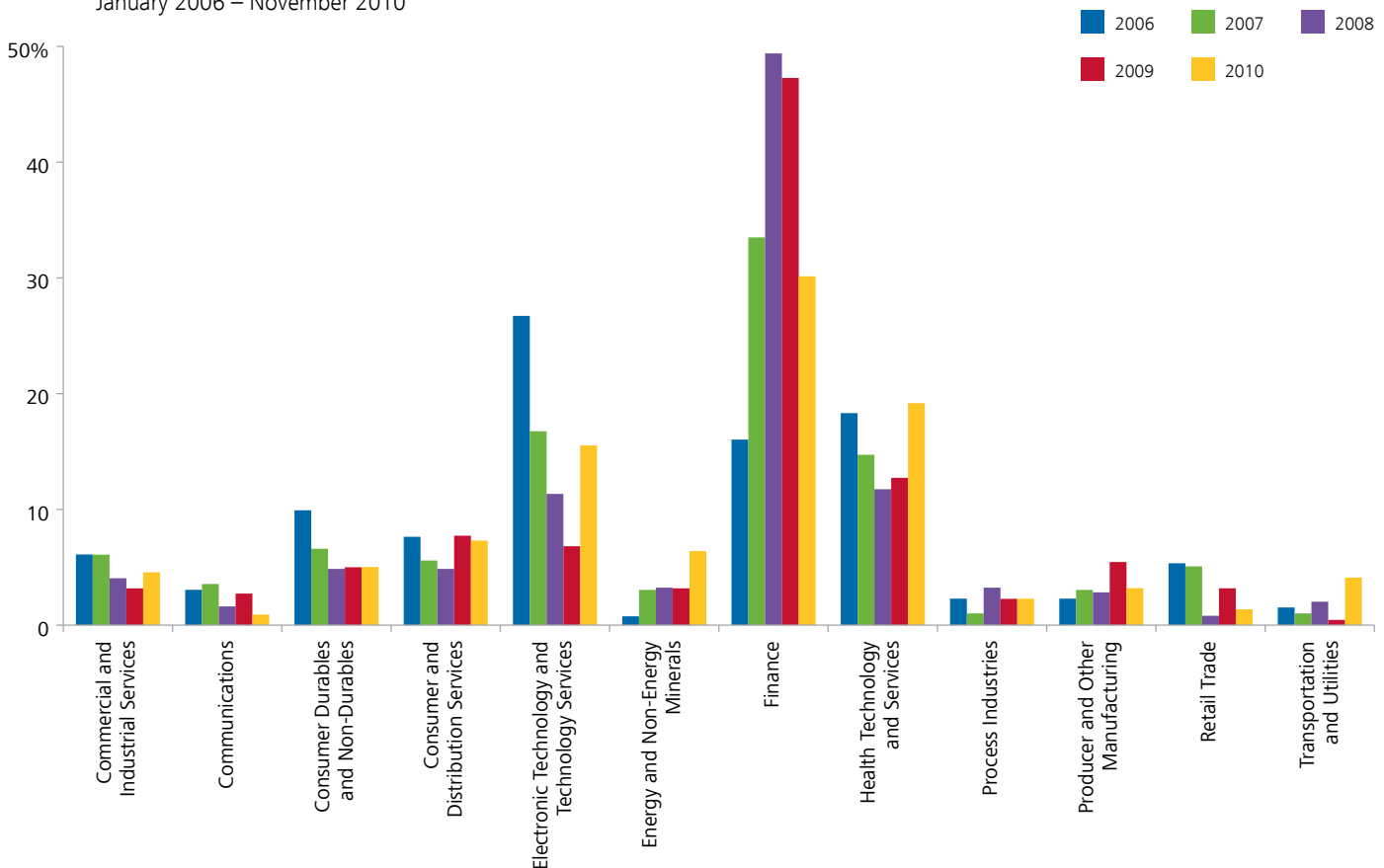
## Filings by Sector

From January through November 2010, as in 2008 and 2009, the financial sector accounted for more filings than any other sector, though such suits have declined to below one-third of all federal securities class actions filed. Of total filings with financial sector companies as the primary defendant in 2010, more than half were unrelated to the credit crisis. See Figure 4.

Comparing 2010 to 2009, there was a large percent increase in filings against health technology firms. However, also notable is the doubling of filings against firms in the electronic technology and technology services sector and the energy and non-energy minerals sector.

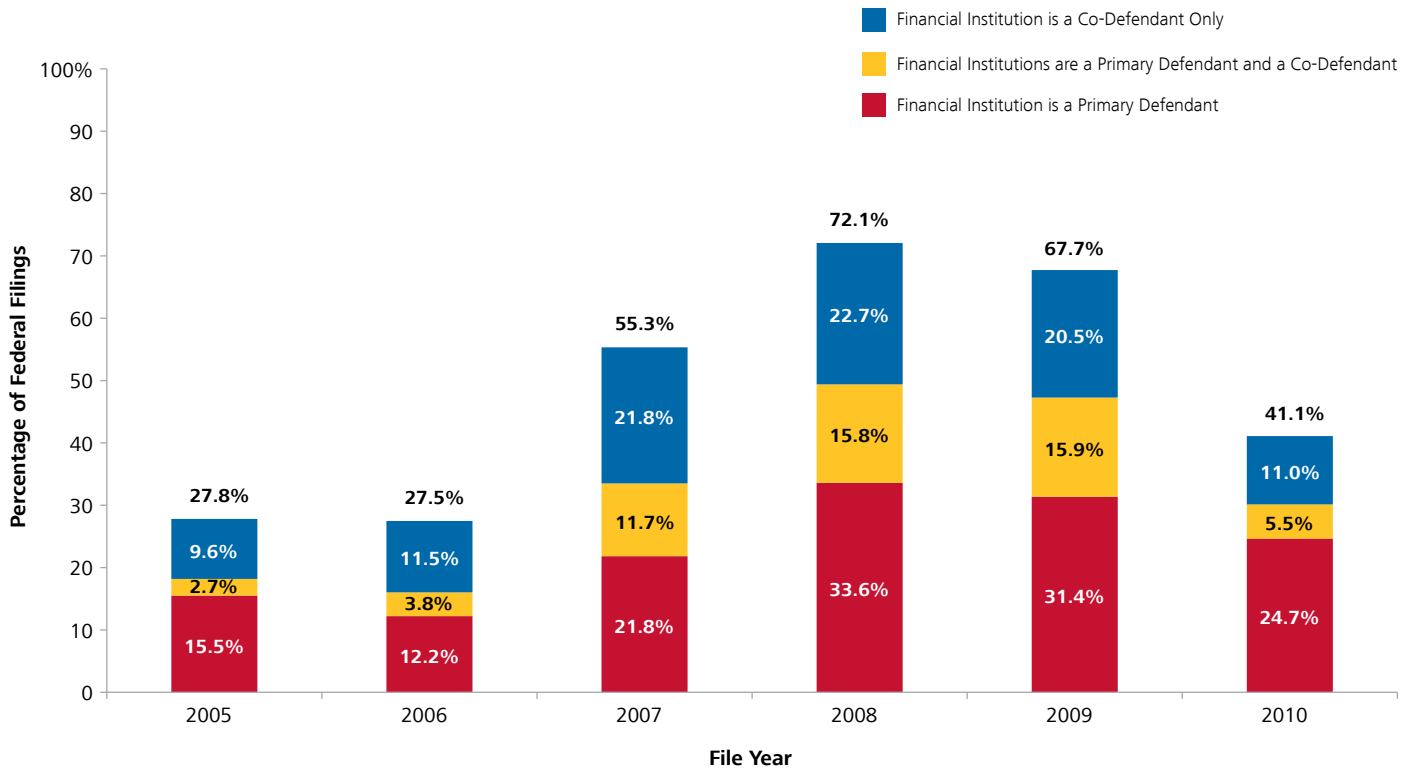
There were slightly more filings against financial sector companies in the Ninth Circuit than in the Second Circuit. However, the Ninth Circuit had approximately double the number of filings that the Second Circuit had against companies in the electronic technology and technology services sector, and the health technology and services sector, the two next largest categories of filings by sector.

Figure 4. **Percentage of Filings by Sector and Year**  
January 2006 – November 2010



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

Figure 5. **All Federal Cases in which Financial Institutions Are Named Defendants**  
January 2005 – November 2010



In 2010, 41% of securities class actions filed have named a financial institution as the primary defendant and/or co-defendant.

The percentage of class actions naming a financial sector company as primary defendant remained considerably higher in 2010 than before the credit crisis. As Figure 5 shows, about 41% of securities class actions filed, 90 cases, named a financial institution as the primary defendant and/or co-defendant. While the number is below the 72% peak observed in 2008, it is considerably higher than the roughly 28% of class actions filed against firms in this sector between 2005 and 2006, prior to the credit crisis.

In 2010, a financial firm was named only as a co-defendant, but not as a primary defendant, in just 11% of all cases filed. This is consistent with levels seen prior to the credit crisis, and well below the more than 20% level observed in 2007, 2008, and 2009. Similarly, the proportion of cases with a financial institution both as primary defendant and as a co-defendant has declined to 5.5% in 2010, about a third of the level in 2008 and 2009. This reflects, at least in part, a decline in the number of credit crisis-related cases in which plaintiffs had invested in securities underwritten or sponsored by defendants.

As Figure 6 shows, the percentage of filings naming an accounting firm as a co-defendant fell to 3.7% in 2010. Over the past five years, that number has ranged from 7.3% in 2008 to 13% in 2006. The reduction in 2010 is, in part, due to a lower number of filings alleging accounting fraud.

Figure 6. **Percentage of Federal Filings in Which an Accounting Firm is a Co-Defendant**  
January 2005 – November 2010

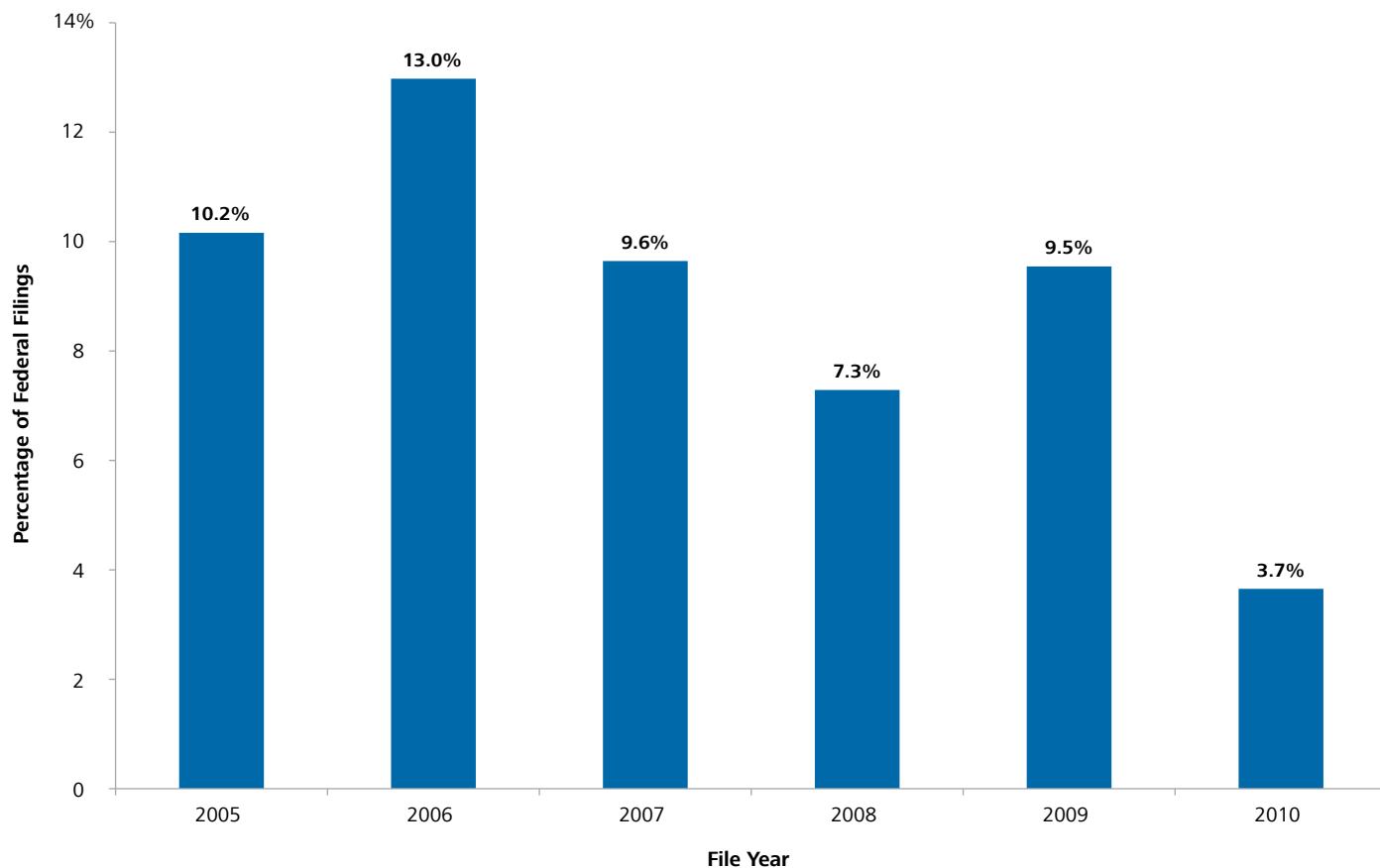
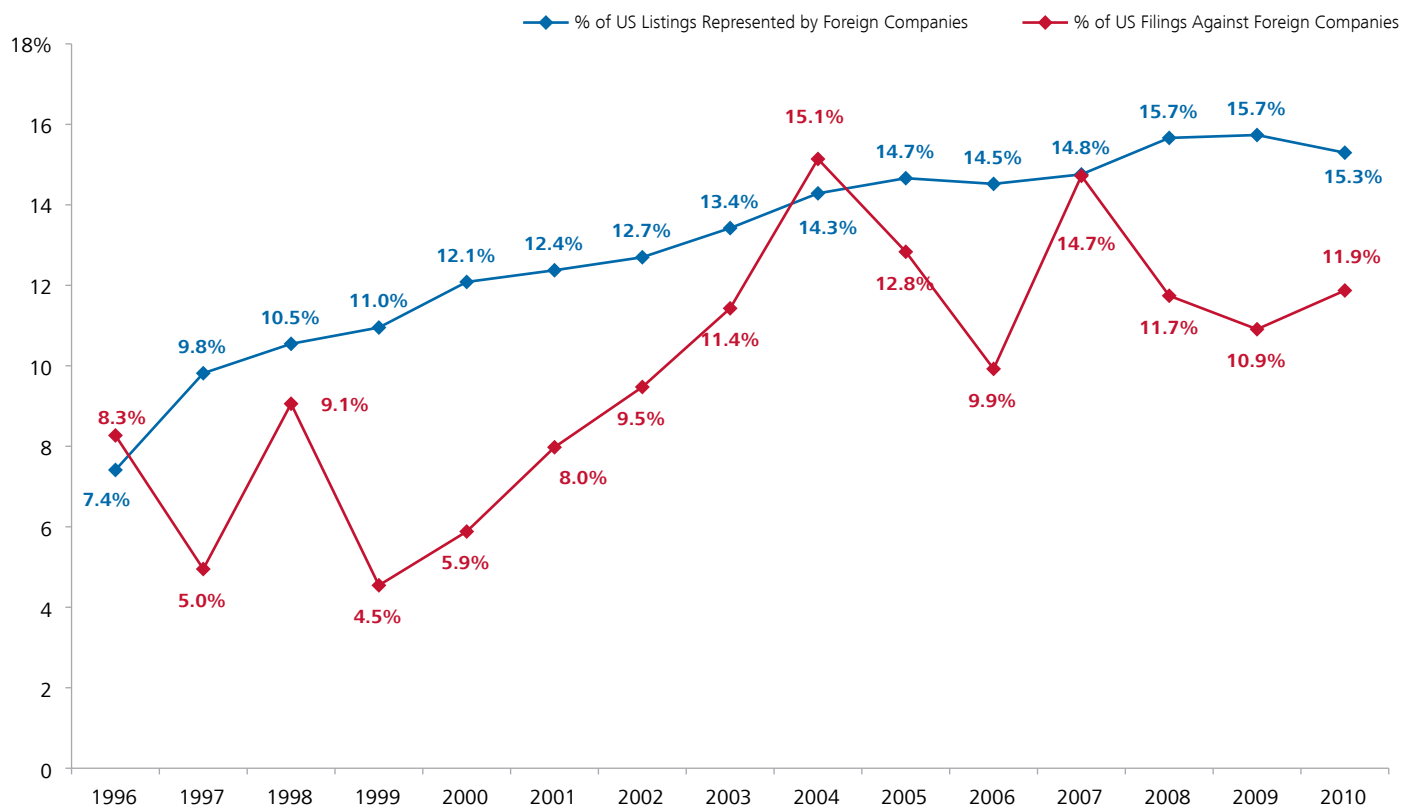


Figure 7. **Proportion of US Listings Accounted for by Foreign Issuers and Proportion of US Filings Against Foreign-Domiciled Companies**  
January 1996 – November 2010



### Filings by Defendant's Country of Domicile

From January through November 2010, 11.9% of cases filed named a foreign-domiciled company as the primary defendant. This is off the prior peak of 15.1% in 2004. See Figure 7. The proportion of filings against foreign-domiciled companies in 2010 was again lower than the proportion of US listings accounted for by foreign issuers, indicating that foreign companies were sued less often than their representation among US-listed stocks would suggest.

From July to November 2010, the proportion of filings naming foreign issuers was 11.4%, as compared to 12.5% in the first half of 2010. This does not reflect the substantial drop that might have been expected following the US Supreme Court's decision, handed down in late June 2010, in *Morrison v. National Australia Bank*. The *Morrison* decision limits US private securities litigation relating to trading of securities outside the US. However, the absence of an observed decline was, in part, due to a spate of suits against Chinese-domiciled companies listed in the US, alleging accounting improprieties and/or ineffective internal controls.

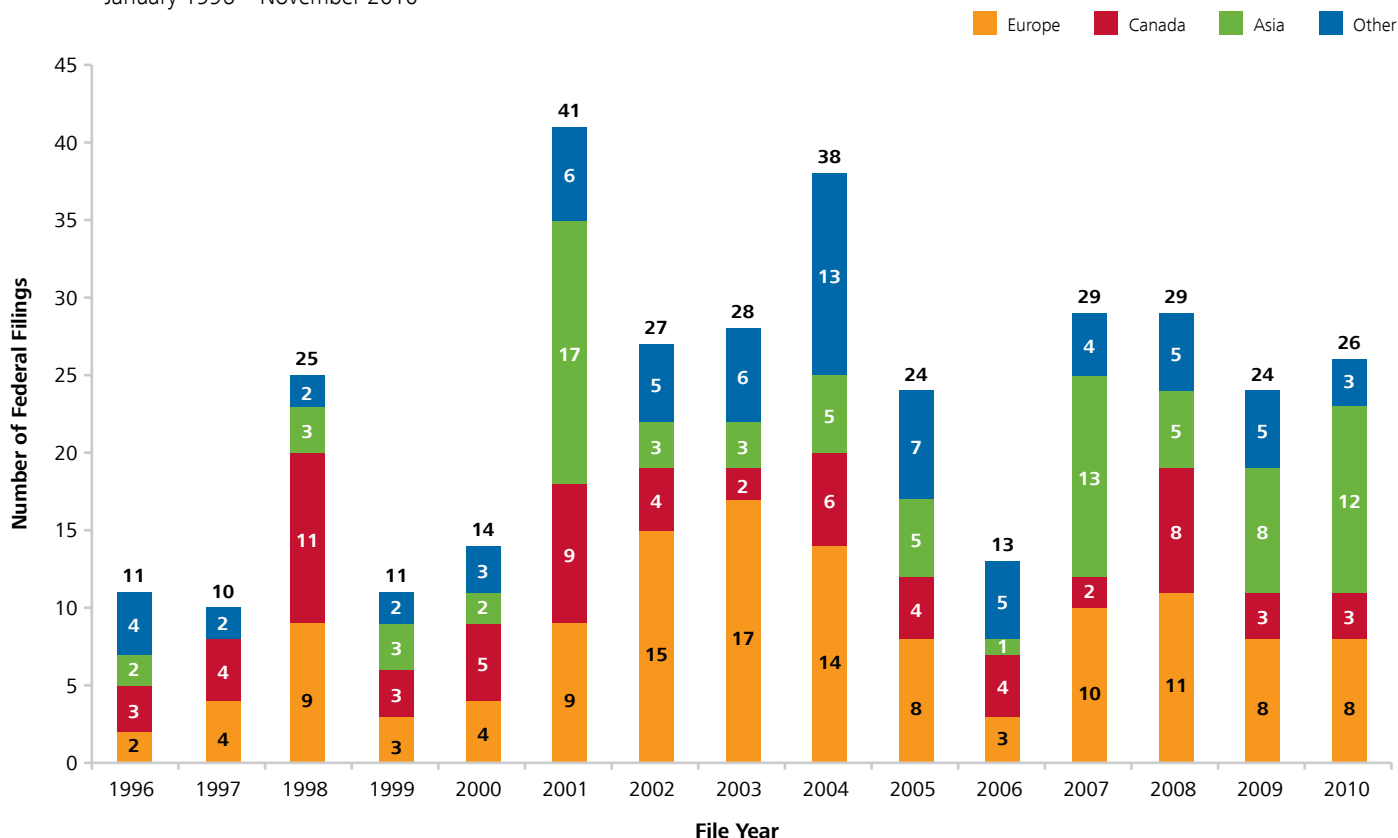
These suits against Chinese companies accounted for half of all suits targeting foreign-domiciled issuers from July through November 2010. Among individual countries, in 2010, over 38% of all cases filed against foreign issuers have named a Chinese company. This recent surge in such suits may have offset any effect of the *Morrison* decision. Excluding these cases, suits against foreign issuers accounted for about 6% of 2010 filings.

In any case, these data illustrate that, while *Morrison* limits claims relating to securities trading outside the US, plaintiffs do continue to file US securities class actions against foreign companies, for example against those whose securities trade on US markets.

Figure 8 shows annual federal filings against foreign-domiciled companies by year and geographic region. Ten of the 12 filings against Asian companies in 2010 were against Chinese-domiciled issuers.

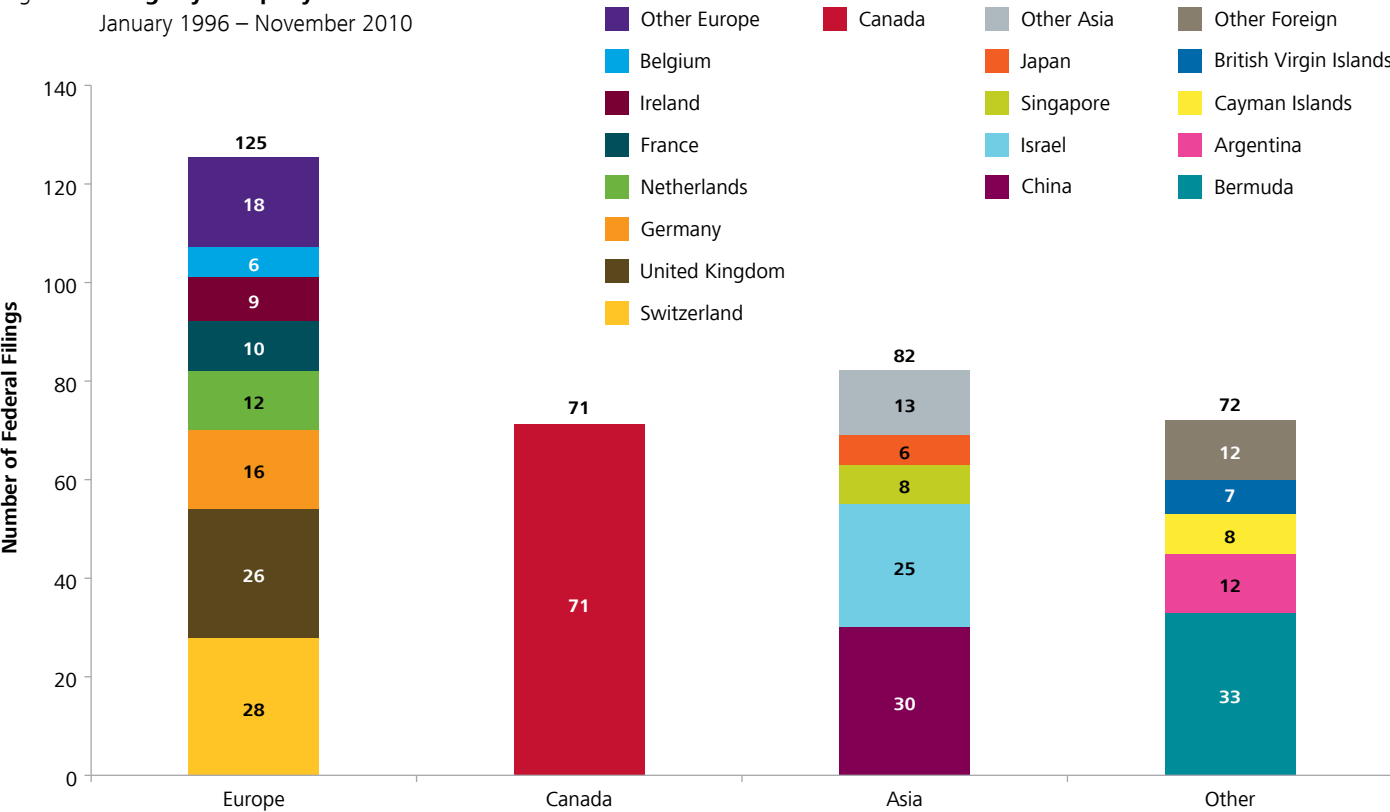
Among individual countries, in 2010, over 38% of all cases filed against foreign issuers have named a Chinese company.

Figure 8. **Filings by Year and Company Domicile**  
January 1996 – November 2010



Among individual countries, since 1996, Canadian companies have been the most frequently named as defendants, with 71 filings total. See Figure 9. Companies domiciled in Europe accounted for 125 filings and 82 filings were against companies domiciled in Asia. The Asian total includes 30 filings against Chinese companies. Many of the companies in the Other category are domiciled in “tax haven” jurisdictions such as Bermuda or the Cayman Islands.

Figure 9. **Filings by Company Domicile**  
January 1996 – November 2010

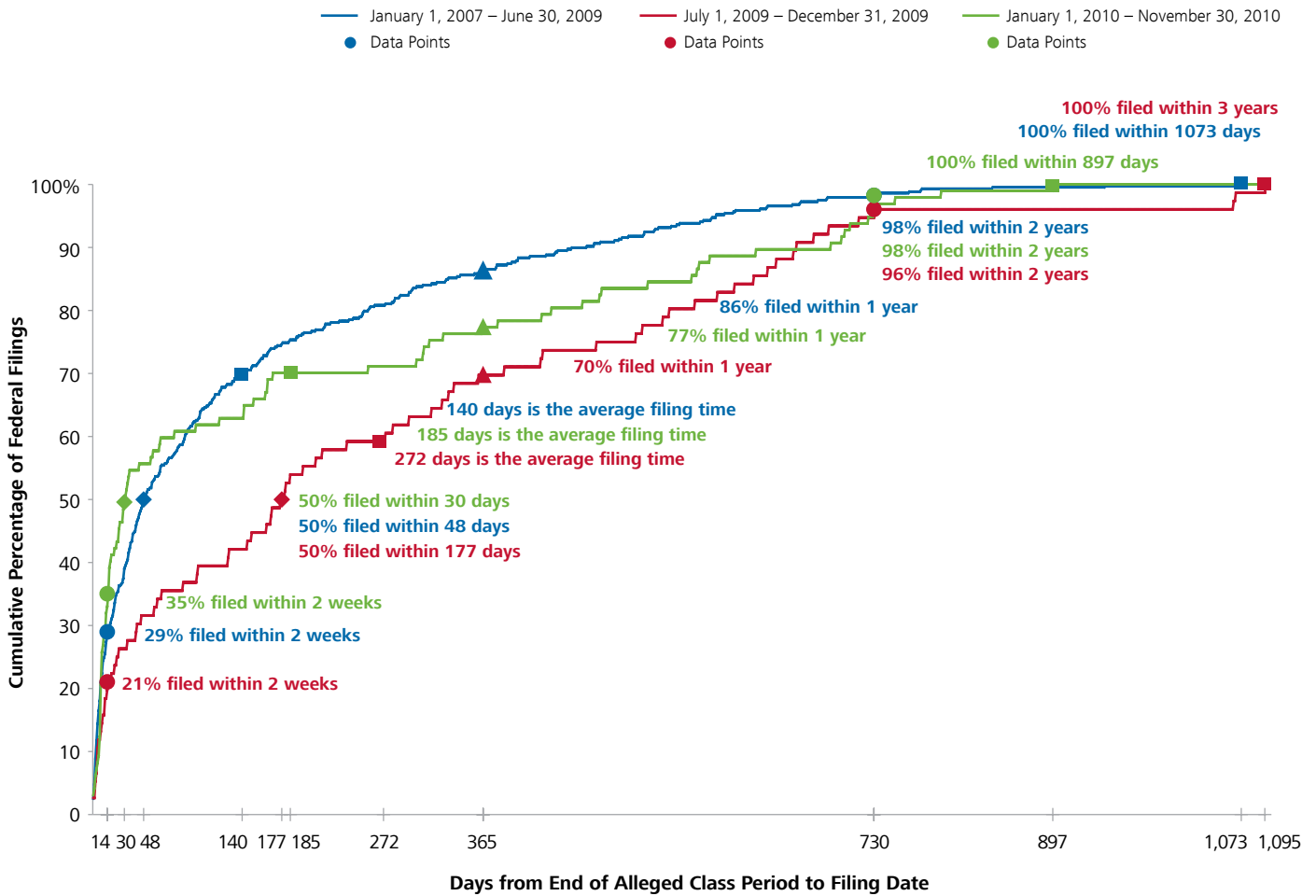


## Time to File

There was a substantial decrease in 2010 in the average number of days between the end of the class period and the filing of the first complaint. For filings in 2010, the median time to file was about a month, a sharp decline from nearly six months for cases filed in the second half of 2009, and shorter even than the median of about a month and a half from January 2007 through June 30, 2009.<sup>7</sup> See Figure 10.

As discussed in our 2010 mid-year study, the increase in late 2009 may have been because the plaintiffs' bar had previously focused on filing cases related to the credit crisis and had developed a backlog of other cases, which it was working through in the second half of 2009, once credit crisis-related class actions began to dwindle.

Figure 10. **Time to Filing of First Complaint**



### Trends in Allegations<sup>8</sup>

Filings with allegations of accounting fraud declined in 2010. This is consistent with the observation made above that fewer filings targeted accounting firms as co-defendants. At the same time, filings with allegations relating to company-specific earnings guidance have shown a slight uptick, but are below the levels observed in the pre-credit crisis period. See Figure 11.

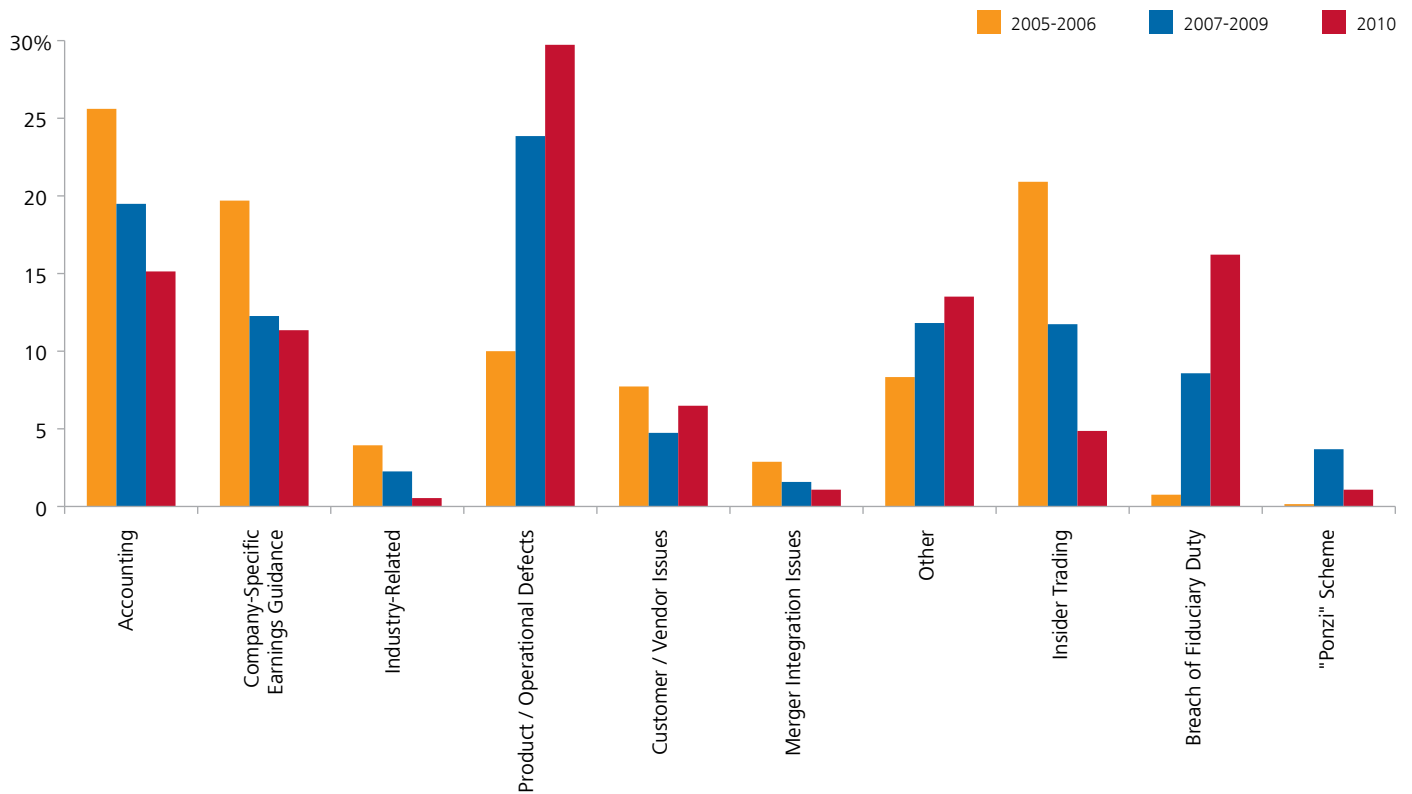
The number of complaints alleging product and operational defects continues to be high. This category of allegations occurred more frequently in 2010 filings than any other. Although the product and operational defects category encompasses both traditional, tangible goods as well as financial products, growth in that category of allegations reflects mostly the former. In fact, cases with allegations specifically involving ETFs

and other financial products have declined since last year. Of the 99 cases filed from January through November 2010 listing product and operational defect allegations, only 41 named a financial sector company as primary defendant.

Filings of cases with breach of fiduciary duty allegations have more than doubled. In 2010, about two-thirds of these cases alleged unfair pricing and process claims, which are often related to pricing in a merger or an acquisition.

Interestingly, filings of cases with insider trading allegations were rarer than in any year since 2005. This stands in contrast with recent investigations of insider trading announced by the Securities and Exchange Commission (SEC) and the Department of Justice.

Figure 11. **Allegations in Federal Filings**  
January 2005 – November 2010



## Trends in Resolutions

### Resolution of Cases by Filing Year

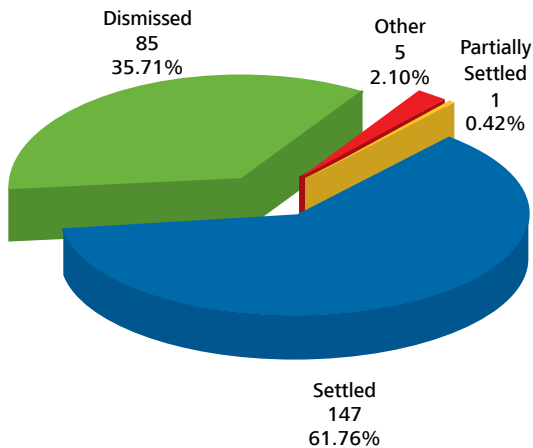
About 60% of federal securities class actions filed and resolved since January 1996 have settled. Of the rest, nearly all have been dismissed.<sup>9</sup> Only a handful of securities class actions have gone to trial and, because some cases settle during trial, a smaller number still have resulted in a verdict. There is substantial variation in the length of time that cases take to be resolved, with dismissals generally taking less time than settlements. To focus on how cases are ultimately resolved, we have tracked the outcomes of the 238 cases filed in 2000.

Of these 238 filings, more than three in five (61.8%) have settled and just over one-third (35.7%) ended in dismissal. Only about 2.5% of cases filed in 2000 remain unresolved; these are either still pending, partially settled, or have been abandoned by plaintiffs.

The cases filed in 2000 took an average of 2.5 years to be resolved, ranging from 12 days to 9.1 years. The average time from filing until settlement was 3.5 years. For cases whose ultimate resolution was a dismissal, the average time from filing until dismissal was 1.8 years.

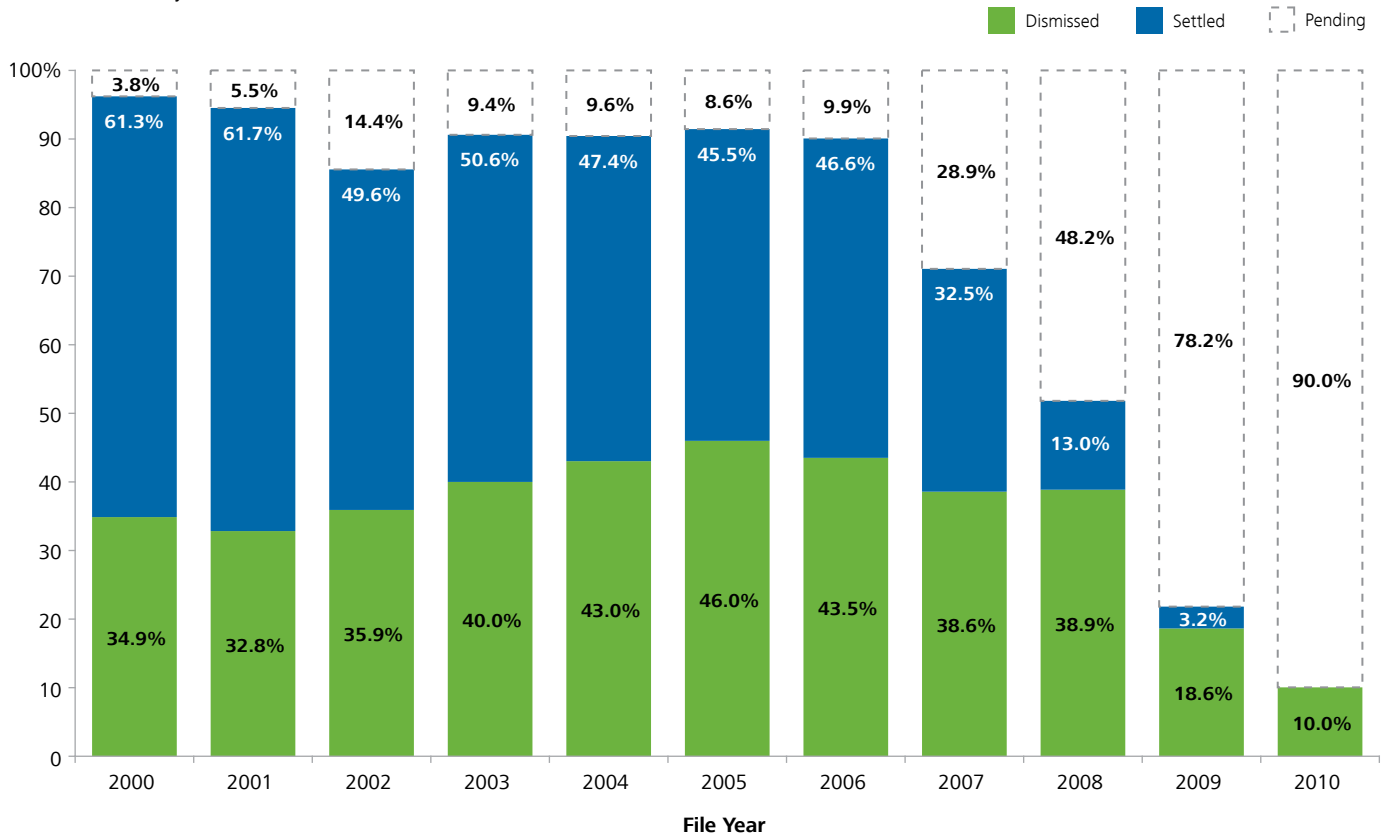
We have also examined resolutions for cases filed subsequent to 2000. The more recent the year, the lower the proportion of resolved cases and the higher the ratio of dismissals to settlements. See Figure 13. In other words, the more time has elapsed since filing, the more the mix of resolutions resembles that observed for cases filed in 2000.

Figure 12. **Status of 238 Federal Securities Class Actions Filed in 2000**  
As of November 30, 2010



Of 230 credit crisis-related class actions, only 8% have settled, while 29% have been dismissed and 63% remain unresolved.

Figure 13. **Status of Cases as Percentage of Federal Filings by File Year**  
January 2000 – November 2010

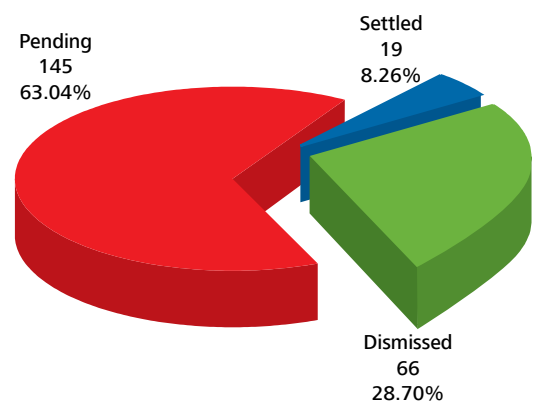


Notes: Filings exclude IPO laddering cases.

Of cases filed in 2010, 90% remain pending and 10% have been dismissed. None has yet settled.

While several prominent credit crisis-related cases settled in 2010 (this is discussed below), most of these cases remained pending as of November 30, 2010. Of 230 federal securities class actions that we have identified as credit crisis-related, only about 8% have settled, 29% have been dismissed, and 63% remain unresolved.

Figure 14. **Status of 230 Credit Crisis-Related Federal Securities Class Actions**  
January 2007 – November 2010



## Securities Class Action Trials

As noted above, it is uncommon for a securities class action to go to trial and even less common for a verdict to be reached. Since the passage of the PSLRA in December 1995, over 3,400 cases have been filed, and over that time only 28 cases have gone to trial.<sup>10</sup> See Table 1. Twenty-two of these cases resulted in a verdict of some kind:

nine resulted in a verdict for defendants; seven resulted in a verdict for plaintiffs, five ended with a mixed verdict, including one which ended in a hung jury, and one case resulted in a default judgment. The other six cases settled before a verdict was reached. See also Figure 15.

Table 1. **Twenty-Eight Securities Class Actions That Went to Trial after PSLRA**

Case	Federal Circuit	File Year	Trial Year <sup>1</sup>
<b>I. Verdict for Defendants (9)</b>			
1 American Mutual Funds (Fee Litigation) <sup>2</sup>	9	2004	2009
2 American Pacific Corp. <sup>3</sup>	9	1993	1997
3 Biogen Inc.	1	1994	1998
4 Everex Systems Inc. <sup>4</sup>	9	1992	2002
5 Health Management, Inc.	2	1996	1999
6 JDS Uniphase Corp.	9	2002	2007
7 NAI Technologies, Inc.	2	1994	1996
8 Thane International, Inc. <sup>5</sup>	9	2003	2009
9 Tricord Systems, Inc.	8	1994	1997
<b>II. Verdict for Plaintiffs (7)</b>			
1 Apollo Group, Inc. <sup>6</sup>	9	2004	2010
2 BankAtlantic Bancorp, Inc. <sup>7</sup>	11	2007	2010
3 Claghorn / Scorpion Technologies, Inc.	9	1998	2002
4 Computer Associates International, Inc.	2	1991	2000
5 Helionetics, Inc.	9	1994	2000
6 Real Estate Associates, LP	9	1998	2002
7 U.S. Banknote Corp. <sup>8</sup>	2	1994	1997
<b>III. Mixed Verdict (5)</b>			
1 Clarent Corp. <sup>9</sup>	9	2001	2005
2 Digitran Systems, Inc. <sup>10</sup>	10	1993	1996
3 ICN Pharmaceuticals, Inc. <sup>11</sup>	2	1987	1996
4 Household International, Inc. <sup>12</sup>	7	2002	2009
5 Vivendi Universal, S.A. <sup>13</sup>	2	2002	2010
<b>IV. Settled During Trial (6)<sup>14</sup></b>			
1 AT&T	3	2000	2004
2 First Union National Bank / First Union Securities / Cypres Funds	11	2000	2003
3 Globalstar Telecommunications, Ltd.	2	2001	2005
4 Heartland High-Yield / Short Duration High Yield Municipal Bond Funds	7	2000	2005
5 WorldCom	2	2002	2005
6 Safety-Kleen Corp. (Bondholders Litigation) <sup>15</sup>	4	2000	2005
<b>V. Default Judgment (1)</b>			
1 Equisure Inc. <sup>16</sup>	8	1997	1998

**Notes:** Until otherwise noted, all these cases went to a jury trial. Data are from case dockets. Cases within each group are presented in alphabetical order.

<sup>1</sup> Trial year shows the year in which a verdict was reached or, in cases with relevant post-trial developments (such as a ruling on an appeal or a re-trial), the year of the most recent such development.

<sup>2</sup> Judgment for defendants entered 12/28/2009 after a 7/28/2009-8/7/2009 bench trial.

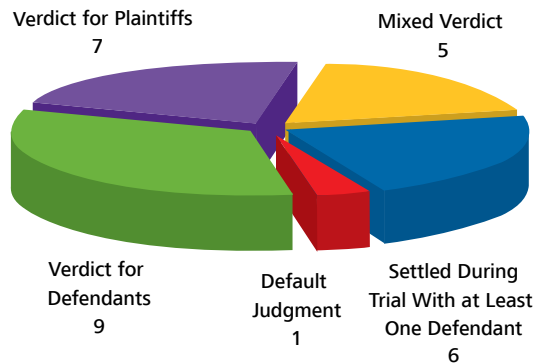
<sup>3</sup> On 11/27/95 the US District Court granted in part the Company's motion for summary judgment. The remaining claims were the subject of a jury trial that began in December 1995 and ended on 1/17/96. The jury reached a unanimous verdict for defendants. Verdict was appealed by plaintiffs, but on 6/5/97 the 1996 verdict was affirmed by the 9th Circuit Court of Appeals.

<sup>4</sup> The 1998 verdict for defendants was reversed and remanded by the 9th Circuit Court of Appeals; a 2002 re-trial again yielded a verdict for defendants.

Table 1. **Twenty-Eight Securities Class Actions That Went to Trial after PSLRA (continued)**

- <sup>5</sup> On 6/10/05 bench trial verdict dismissed the case., which had been appealed by plaintiffs. Thereafter, plaintiffs filed a notice of appeal from the trial. On 11/26/07, the US Court of Appeals of the 9th Circuit reversed and remanded the action back to District Court with instructions to enter judgment in plaintiffs' favor. On 12/5/08 the defendants filed Motions for Judgment. On 3/17/09, the Court granted the defendants' Motion for Judgment On Loss Causation but denied the Motion for Judgment On Lack Of Control Person Liability And Good Faith Defenses. Final Judgment on behalf of the defendants was entered on 3/25/09.
- <sup>6</sup> On 1/16/08 a federal jury found Apollo Group Inc. and certain former officers liable for securities fraud and awarded damages of \$5.55 per share. On 8/8/08 the District Court overturned the jury verdict and entered judgment in defendants' favor. Following the dismissal, a notice of appeal was filed on 8/29/08. On 6/23/10 the United States Court of Appeals for the 9th Circuit reversed the District Court's post-trial ruling and remanded the case with instructions that the District Court enter judgment in accordance with the jury's verdict.
- <sup>7</sup> On 11/18/10 the jury returned a verdict in plaintiffs' favor, finding seven of the statements to have been false, and awarding damages of \$2.41 per share.
- <sup>8</sup> Judge subsequently vacated the jury verdict and approved a settlement.
- <sup>9</sup> Chairman of Clarent liable; Ernst & Young not liable.
- <sup>10</sup> A 9/30/96-10/24/96 jury trial resulted in a mixed verdict, with liability for Digitran Systems, Inc. and its former president, but not liable verdict for other individual defendants and the auditor, Grant Thornton.
- <sup>11</sup> Hung jury.
- <sup>12</sup> The jury found in favor of the defendants with respect to 23 of the alleged misstatements, but in favor of the plaintiffs with respect to 17 other statements.
- <sup>13</sup> The trial started 10/5/09. On 1/29/10 the jury returned a verdict against the company on all 57 of the plaintiffs' claims. However, the jury also found that the two individual defendants, (former CEO Jean-Marie Messier and former CFO Guillaume Hannezo) were not liable.
- <sup>14</sup> At least one defendant settled after the trial began, but prior to judgment.
- <sup>15</sup> Some director-defendants settled during the trial. Default judgment against CEO and CFO who failed to show up for trial.
- <sup>16</sup> Default judgment against Equisure Inc. which failed to show up for trial.

Figure 15. **Status of 28 Shareholder Class Actions That Went to Trial After PSLRA**  
As of November 30, 2010

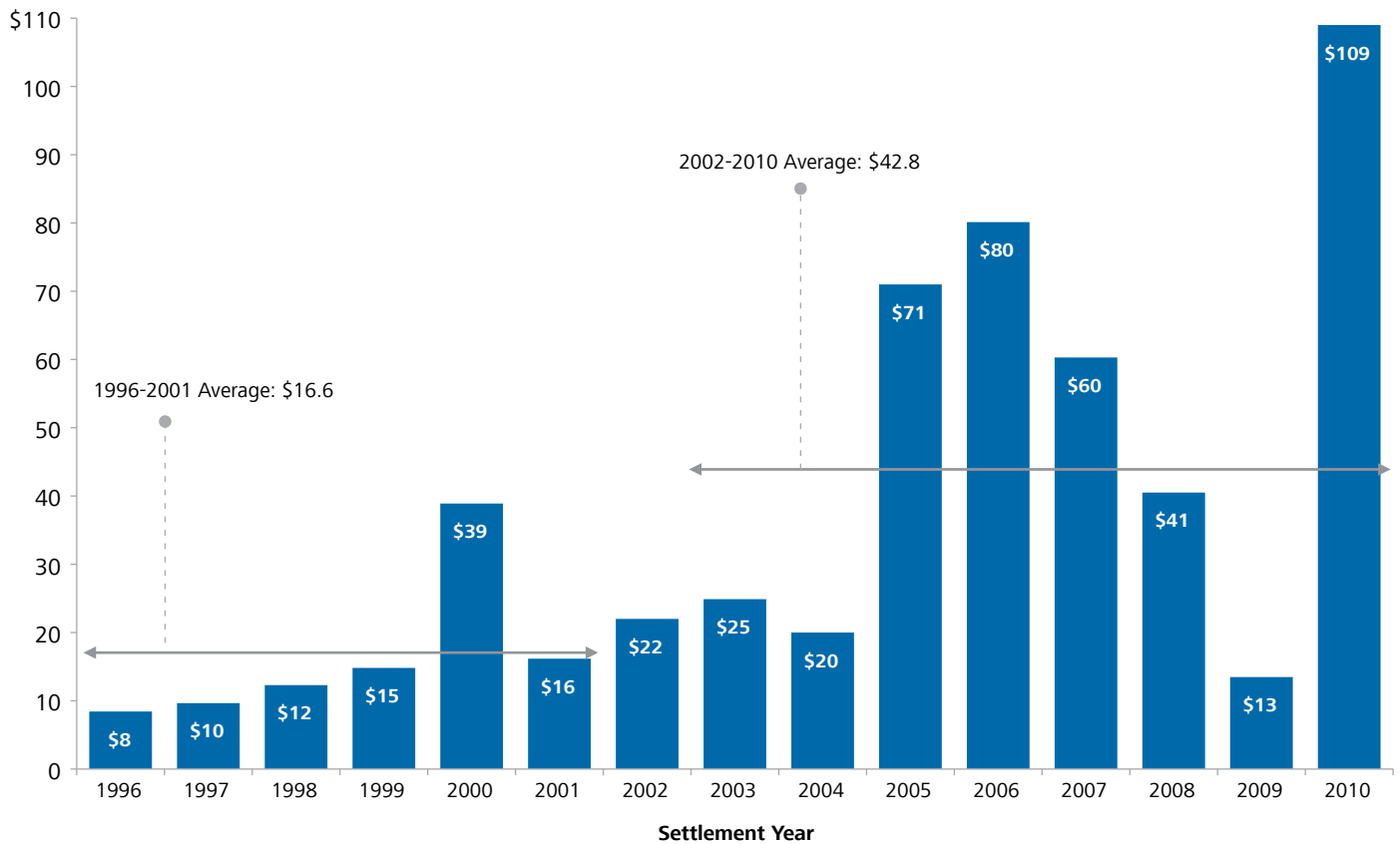


In 2010, there have been two trial verdicts and one restoration of an earlier verdict. On January 29, 2010, a jury found Vivendi, but not two individual defendants, liable on all 57 of plaintiffs' claims. On June 23, 2010, the US Court of Appeals for the Ninth Circuit restored an estimated \$277.5 million jury verdict for plaintiffs in the Apollo Group securities litigation; the verdict had earlier been set aside by a district court. Most recently, on November 18, 2010, a jury found defendants liable in the class action against BankAtlantic Bankcorp, Inc., the first trial verdict in a credit crisis-related securities class action. Aggregate damages in the BankAtlantic case have been estimated as high as \$42 million.<sup>11</sup>

## Settlements<sup>12</sup>

The average securities class action settlement in 2010 was a record \$109 million. This substantially exceeds the previous high of \$80 million in 2006. See Figure 16. NERA assigns each settlement to the year in which it was approved by the court. For class actions in which multiple defendants have settled, the entire settlement amount paid by all defendants is assigned to the year in which the last settlement received court approval. In the Enron class action, the last settlement to be approved by the court received approval in February 2010. The \$7.2 billion settlement in that case is thus included in the 2010 average and has a substantial impact on that number.

Figure 16. **Average Settlement Value (\$MM), All Cases**  
January 1996 – December 2010

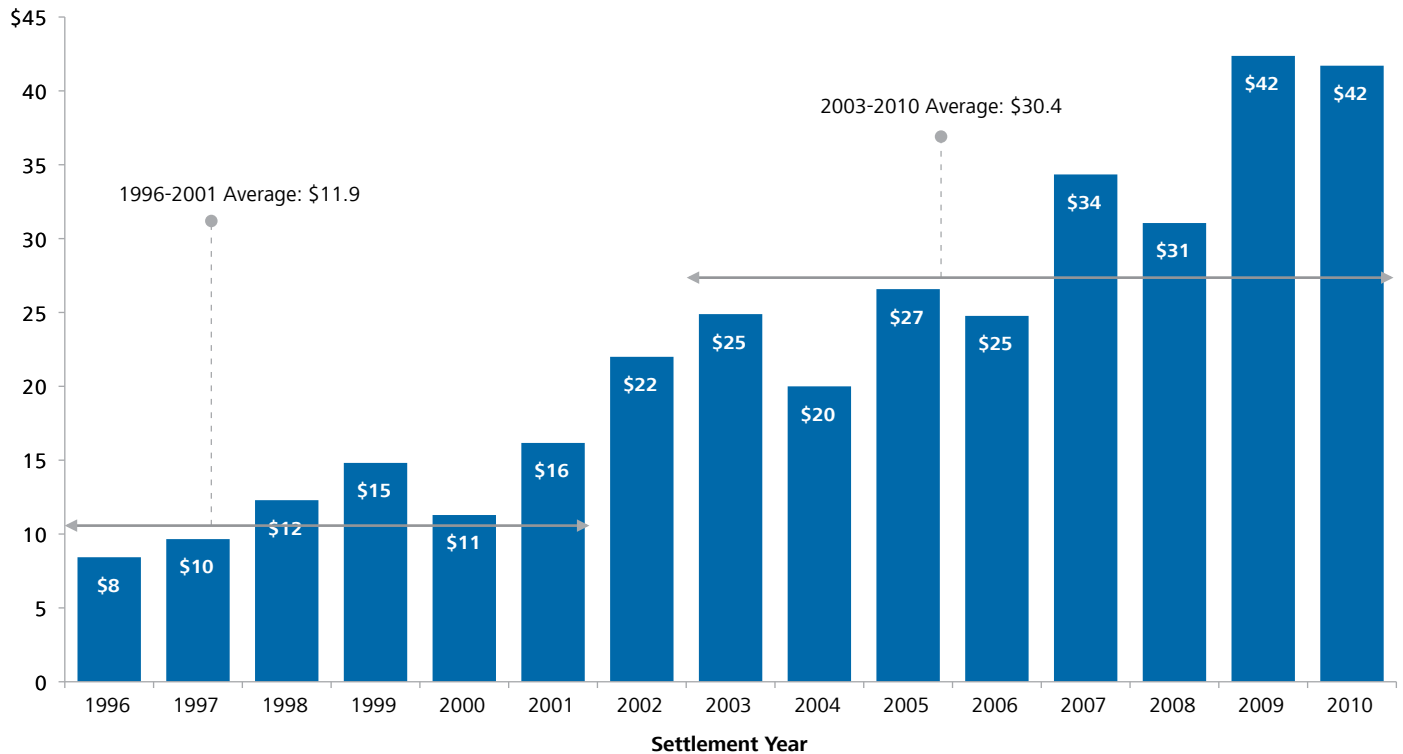


Notes: Settlements include IPO laddering cases.

Excluding outliers, the average settlement for 2010 was \$42 million, in line with last year's record high.

The picture looks somewhat different if we calculate the average excluding "outlier" settlements—both those over \$1 billion and the 309 small settlements approved in 2009 relating to cases with IPO laddering allegations, which were mostly filed in 2001. Even computed in this manner, however, the average settlement in 2010, \$42 million, was still in line with last year's record high. See Figure 17.<sup>13</sup>

Figure 17. **Average Settlement Value (\$MM), Excluding Settlements over \$1 Billion and 309 Settlements in IPO Securities Litigation**  
January 1996 – December 2010

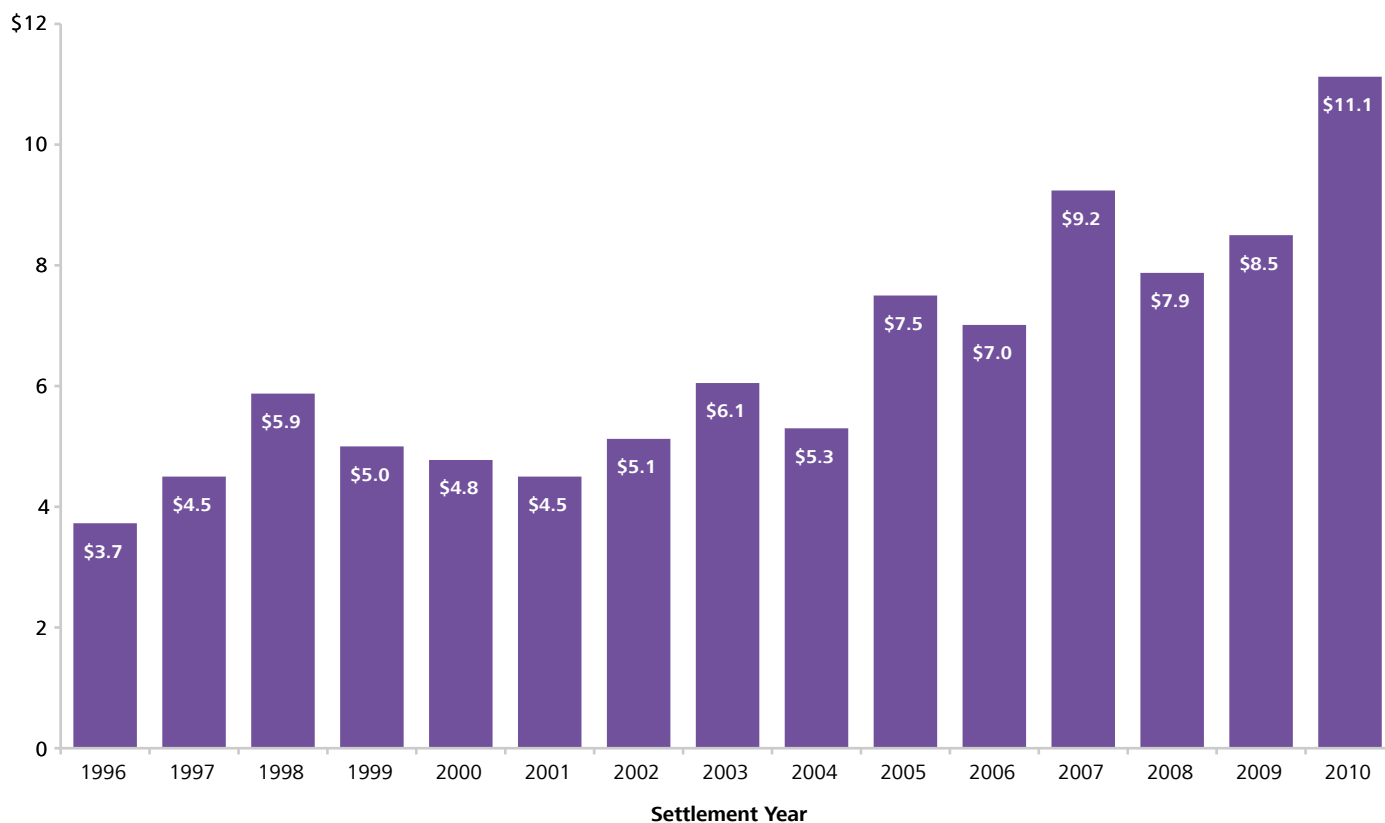


**Notes:** Average settlement shown without final settlements over \$1 billion: the 2000 Cendant, 2005 WorldCom, the 2006 Royal Ahold, AOL Time Warner, two Nortel Networks, the 2007 Tyco International, Ltd., the 2008 McKesson HBOC Inc. and the 2010 Enron settlements.

Tracking changes in the median settlement—the amount at which half of a year’s settlements are above and half are below—is a way to get a read on the trend in the size of the typical class action settlement. In 2010, the median settlement

jumped to \$11.1 million, an all-time high. See Figure 18. The median settlement in 2010 was nearly a third more than last year’s \$8.5 million median and the first time that the size of the typical settlement has exceeded \$10 million.

Figure 18. **Median Settlement Value (\$MM)**  
January 1996 – December 2010



Notes: Settlements exclude IPO laddering cases.

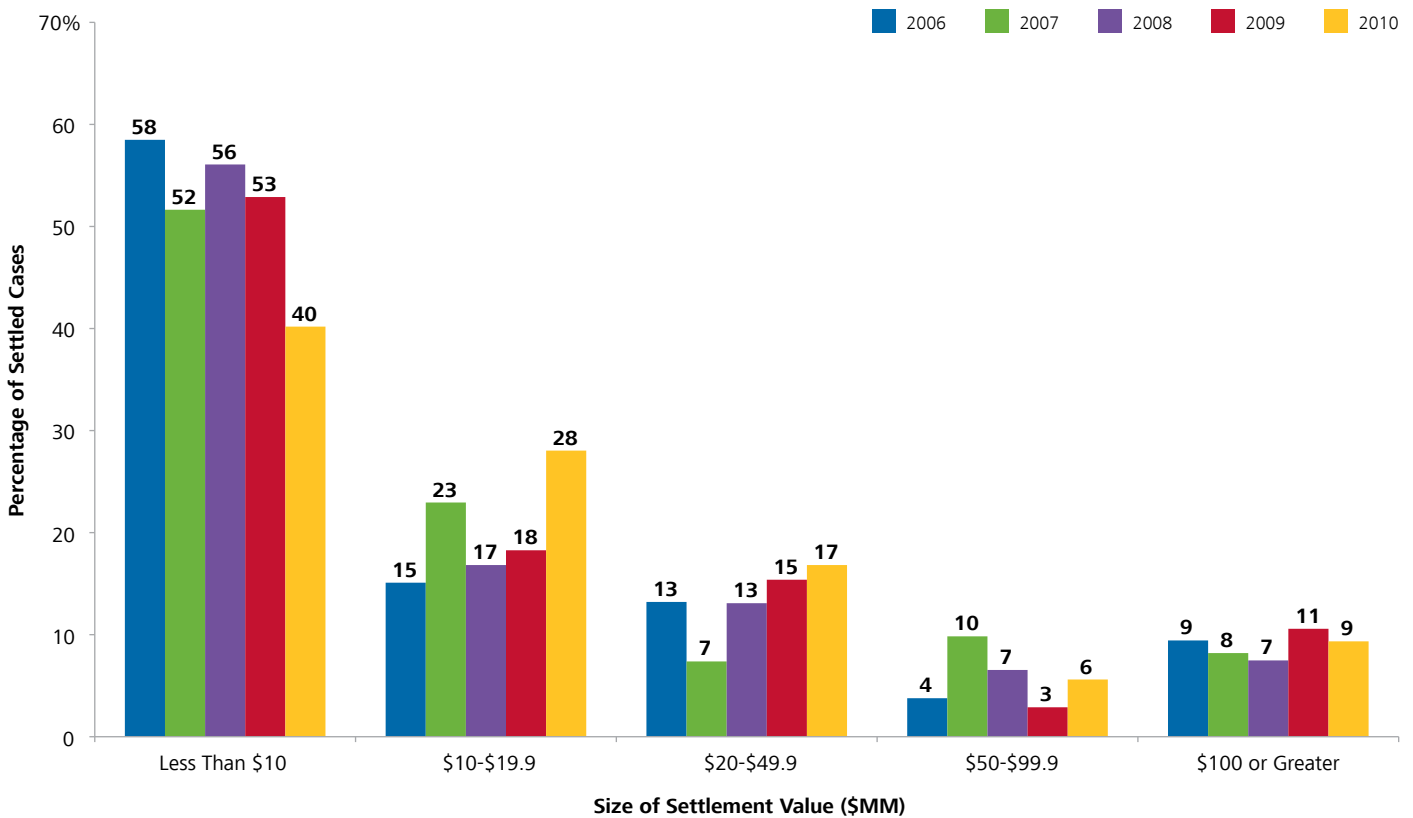
The median settlement value, a strong indicator of trends in the typical settlement, jumped to an all-time high of \$11.1 million.

### Distribution of Settlements

Underlying the record high median settlement in 2010 is a shift at the low end of the distribution of settlements. Figure 19 shows the distribution of settlement values from 2006 to 2010. In each year from 2006 through 2009, there were more than twice as many settlements below \$10 million as between \$10 million and \$20 million. In 2010, however, there were nearly three-quarters as many settlements between \$10 million and \$20 million as below \$10 million.

Table 2 shows the top 10 securities class action settlements. Note that, with the addition of the AIG settlement to the list earlier in the year, all of the top 10 settlements now exceed \$1 billion.

Figure 19. **Distribution of Settlement Values (\$MM)**  
January 2006 – December 2010



Notes: Settlements exclude IPO laddering cases.

# All of the top 10 securities class action settlements now exceed \$1 billion.

Table 2. **Top 10 Securities Class Action Settlements (As of December 13, 2010)**

Ranking	Company	Settlement Year	Total Settlement Value (\$MM)	Settlements with Co-Defendants that Were		Accounting Firms <sup>1</sup>	
				Financial Institutions <sup>1</sup>	Percent	Value (\$MM)	Percent
1	Enron Corp. <sup>2</sup>	2010	\$7,242	\$6,903	95%	73	1%
2	WorldCom, Inc. <sup>3</sup>	2005	6,158	6,004	98%	65	1%
3	Cendant Corp. <sup>4</sup>	2000	3,561	342	10%	335	9%
4	Tyco International, Ltd.	2007	3,200	<i>n.a.</i>	<i>n.a.</i>	225	7%
5	AOL Time Warner Inc.	2006	2,650	<i>n.a.</i>	<i>n.a.</i>	100	4%
6	Nortel Networks (I)	2006	1,143	<i>n.a.</i>	<i>n.a.</i>	<i>n.a.</i>	<i>n.a.</i>
7	Royal Ahold, NV	2006	1,100	<i>n.a.</i>	<i>n.a.</i>	<i>n.a.</i>	<i>n.a.</i>
8	Nortel Networks (II)	2006	1,074	<i>n.a.</i>	<i>n.a.</i>	<i>n.a.</i>	<i>n.a.</i>
9	McKesson HBOC Inc.	2008	1,043	10	1%	73	7%
10	American International Group, Inc. <sup>5</sup>	2010	1,010	187	19%	98	10%
	Total		28,179	13,446	48%	968	3%

Note that for this summary table only, tentative and partial settlements are included for comparison, and "Settlement Year" in this table represents the year in which the last settlement—whether partial or final—had the first fairness hearing. For partial tentative settlements "Settlement Year" is the year in which this settlement was announced.

<sup>1</sup> If "n.a.", either the case did not have a financial institution or an accounting firm co-defendant, or none of the settlement value in column (4) was paid by a financial institution or an accounting firm co-defendant.

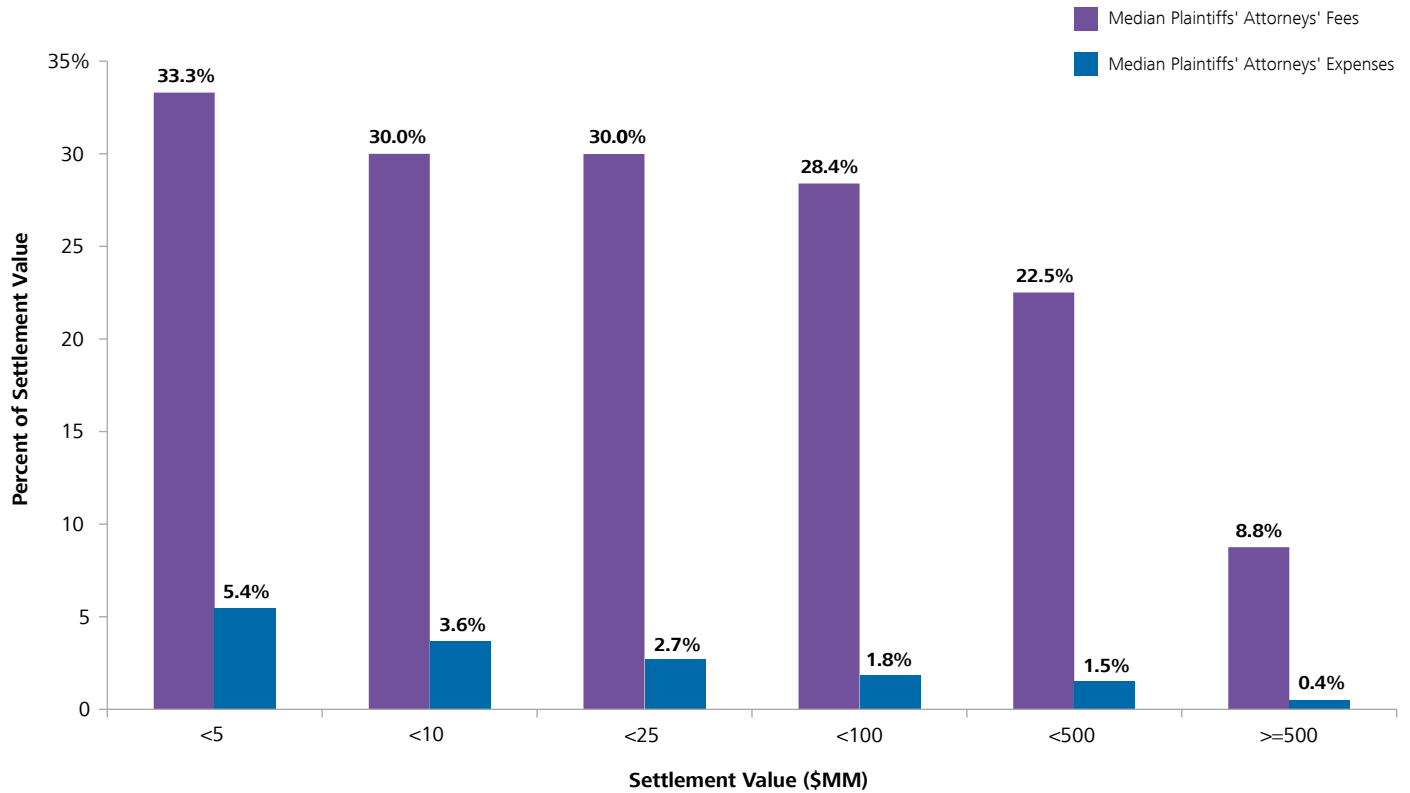
<sup>2</sup> This settlement includes eight partial settlements. All remaining defendants in this case were dismissed December 2, 2009. The fairness hearing for the last tentative partial settlement with Goldman Sachs was held on February 4, 2010.

<sup>3</sup> The settlement value incorporates a \$1.6 million settlement in the MCI WorldCom TARGETS case.

<sup>4</sup> The settlement value incorporates a \$374 million settlement amount in the Cendant PRIDES I and PRIDES II cases. Settlement in the Cendant PRIDES I case was a non-cash settlement valued at \$341.5 million.

<sup>5</sup> This settlement includes one final partial settlement and three tentative settlements.

Figure 20. **Median Plaintiffs' Lawyers' Fees and Expenses as Percent of Settlement Value**  
January 1996 – December 2010



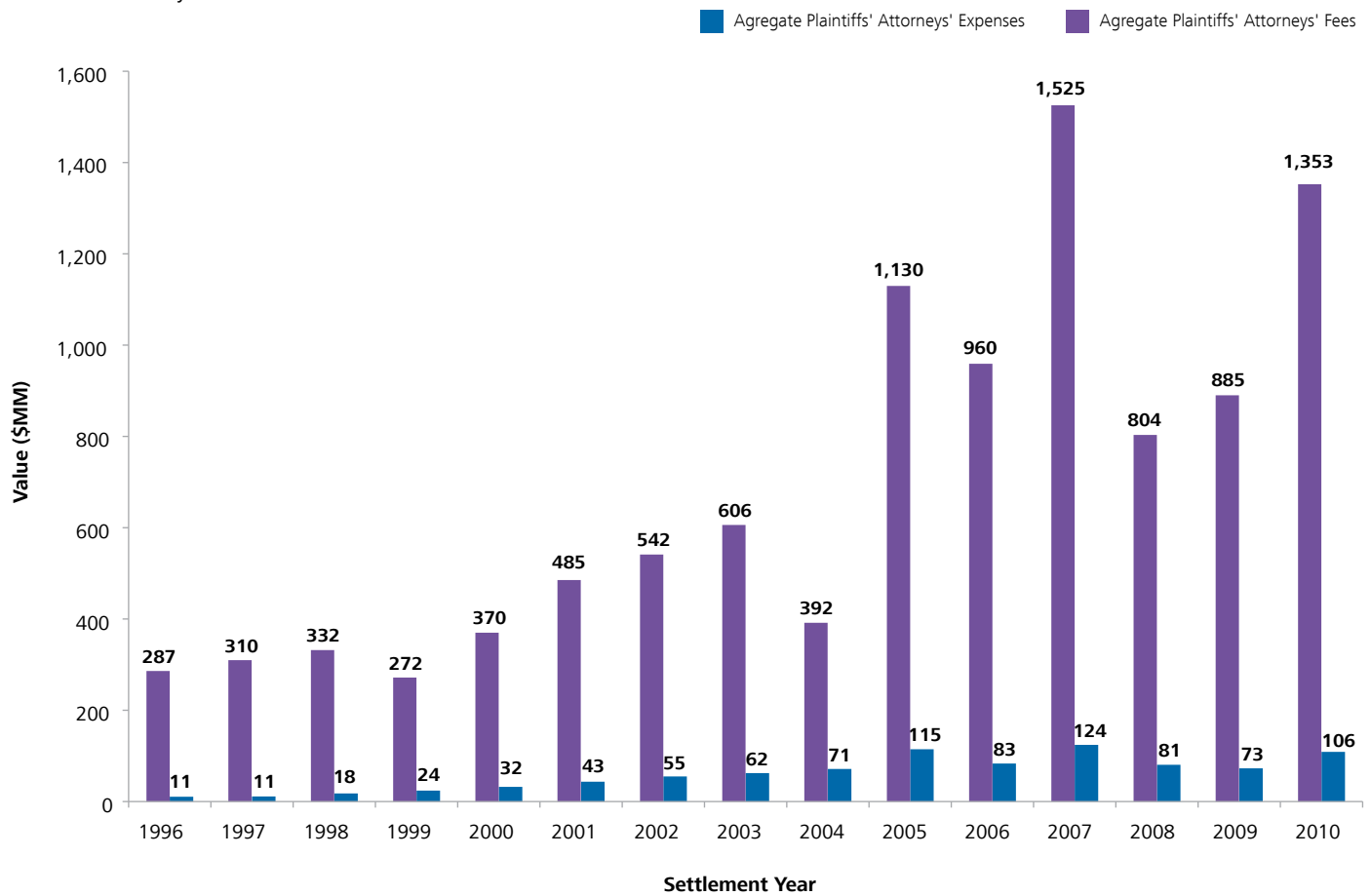
### Plaintiffs' Attorneys' Fees and Expenses

As settlement size rises, plaintiffs' lawyers' fees decline as proportion of the settlement. For settlements below \$5 million, such fees make up approximately one-third of the settlement value. This fraction declines only slightly as settlement size rises to \$100 million. For settlements between \$100 million and \$500 million, however, median attorney fees fall to 22.5% of post-PSLRA settlements. For settlements above \$500 million, this declines to 8.8%. See Figure 20.

Plaintiffs' lawyers' expenses also decline as a percentage of the settlement value as settlement size increases. Figure 20 shows that expenses represent more than 5% of settlements below \$5 million, but below 0.5% of settlements over \$500 million.

As we predicted might happen in our mid-year study, aggregate fees in 2010 of \$1.353 billion have exceeded the total for last year and are second only to the record set in 2007, when they reached \$1.525 billion. See Figure 21. Aggregate expenses, at \$106 million, are also at their highest level since 2007.

Figure 21. **Aggregate Plaintiffs' Lawyers' Fees and Expenses**  
January 1996 – December 2010



# Median investor losses jumped to an all-time high of \$604 million.

## Investor Losses versus Settlements

In 2010, median investor losses jumped to an all-time high of \$604 million, whereas they had never exceeded \$400 million in any prior year. Historically, the investor losses variable has been a powerful predictor of settlement size, explaining more than half of the variation in settlement amount, controlling for other characteristics of the case.<sup>14</sup> The jump in median investor losses thus helps explain the substantially higher observed median settlement in 2010. See Figure 22.

Figure 22. **Median Investor Losses (\$MM) by Settlement Year**  
January 1996 – December 2010

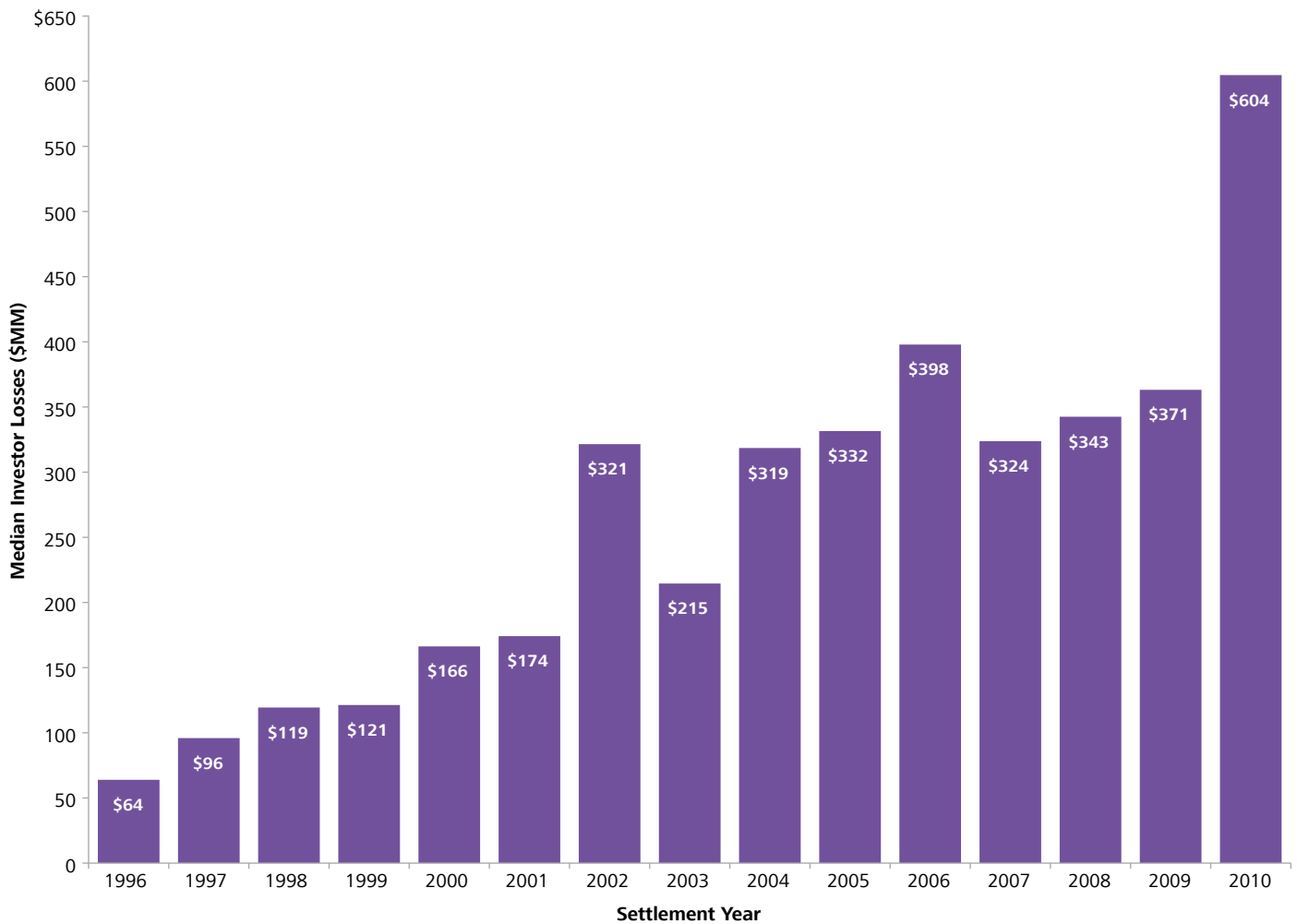
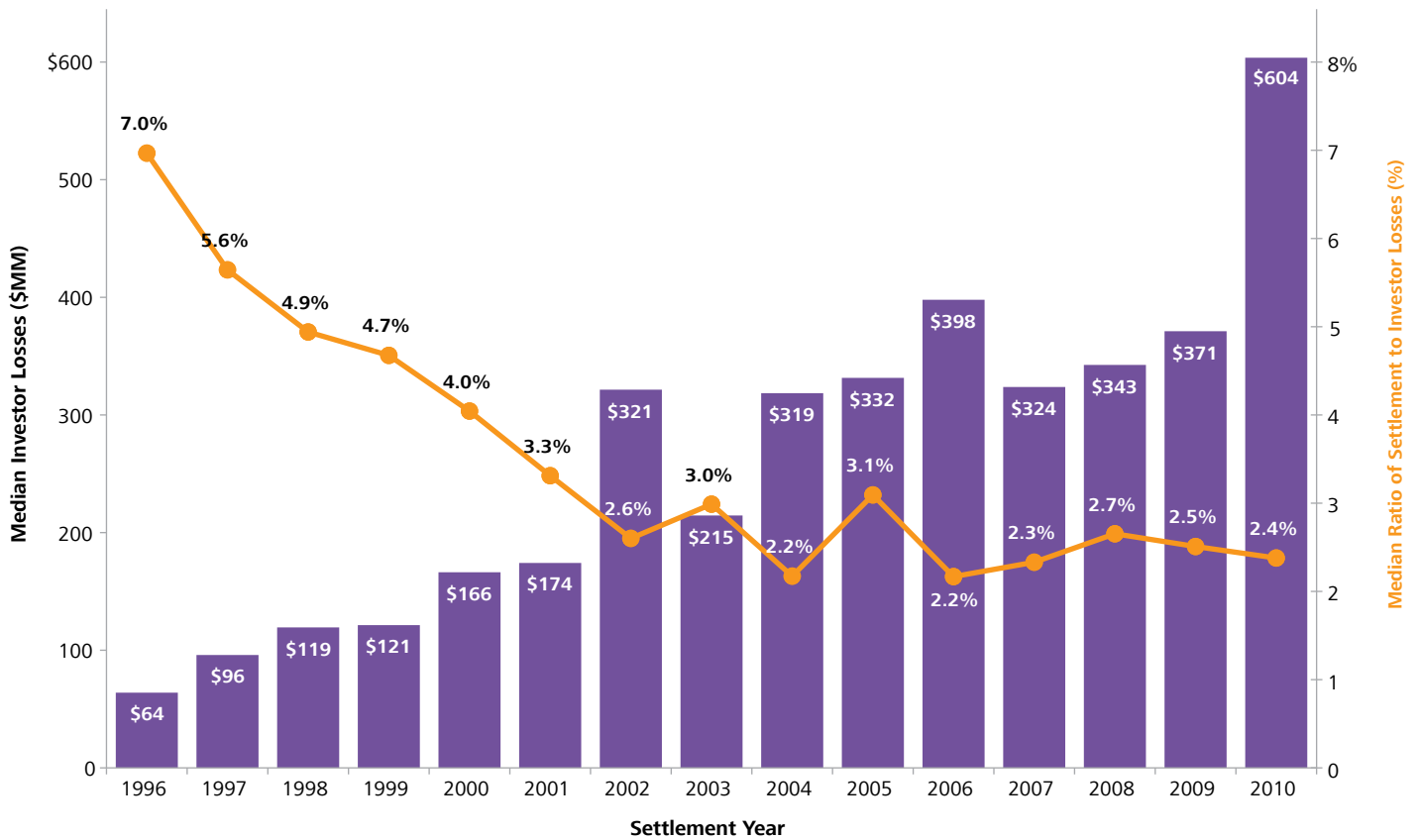


Figure 23. **Median Investor Losses and Median Ratio of Settlement to Investor Losses By Settlement Year**  
 January 1996 – December 2010



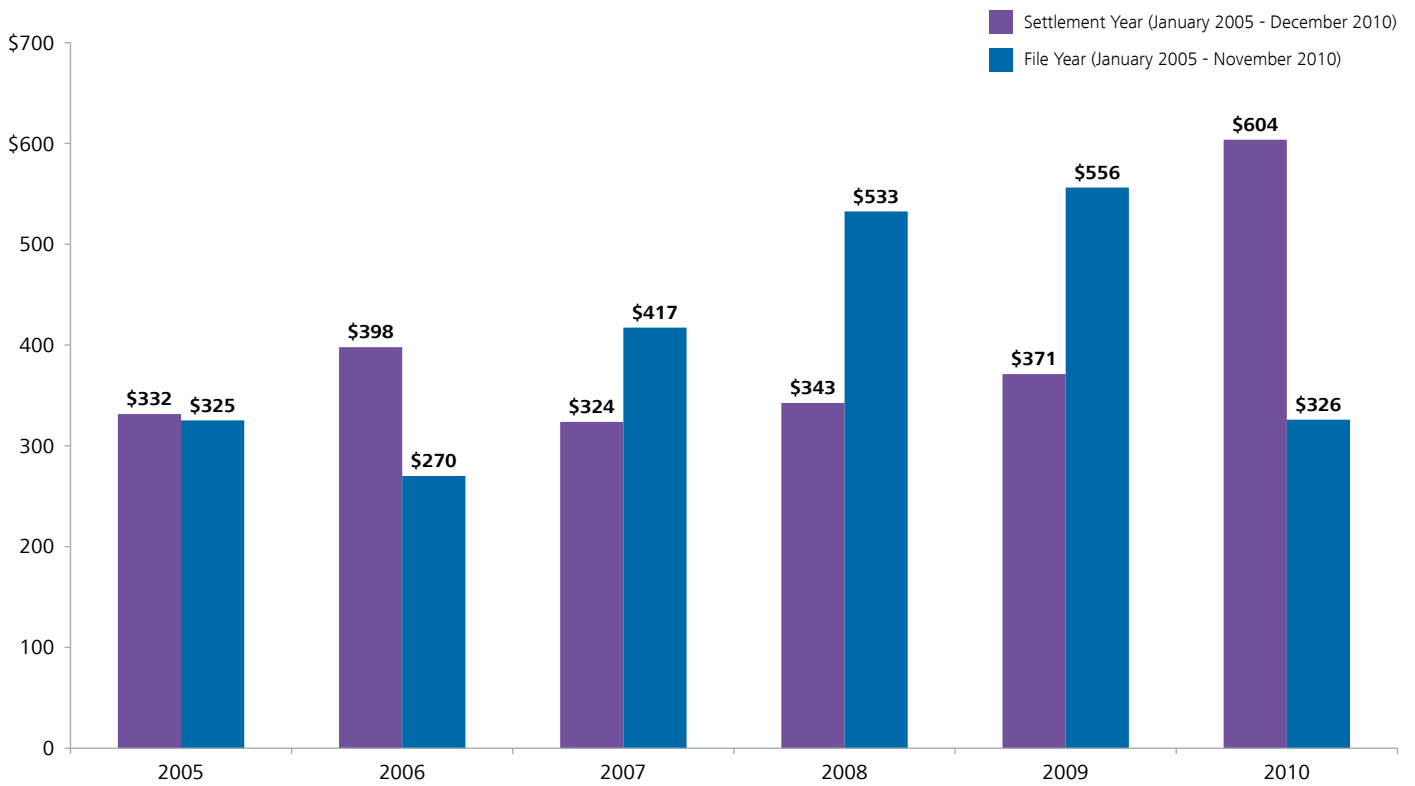
Notes: Excludes IPO laddering cases.

One possible measure of plaintiffs’ recovery is the proportion that settlements represent of the size of cases, as proxied for by investor losses. Comparing the median settlement in a particular year to median investor losses conveys a rough idea of what proportion of claimed damages plaintiffs receive as a settlement. As Figure 23 shows, this proportion fell from 1996 to 2002 but has been stable in recent years. The median ratio of settlement to investor losses trended down from 7% in 1996 to the 2.2% – 3.1% range observed since 2002, and was 2.4% in 2010.

Because investor losses are a predictor of settlement size, median investor losses for filed cases can be an indication of settlement sizes in the future. If investor losses for cases filed in a particular year exceed investor losses for cases that settle in that year, settlements might be expected to increase once the recently filed cases work their way through the litigation pipeline.

From 2007 through 2009, as many credit crisis cases were filed, investor losses for filed cases did exceed investor losses for cases settled during those years. As Figure 24 shows, however, in 2010, median investor losses for filed cases were down substantially, in line with pre-credit crisis levels, and well below investor losses for settled cases. As post-credit crisis cases settle, they may push the median settlement in future years down closer to the historical median.

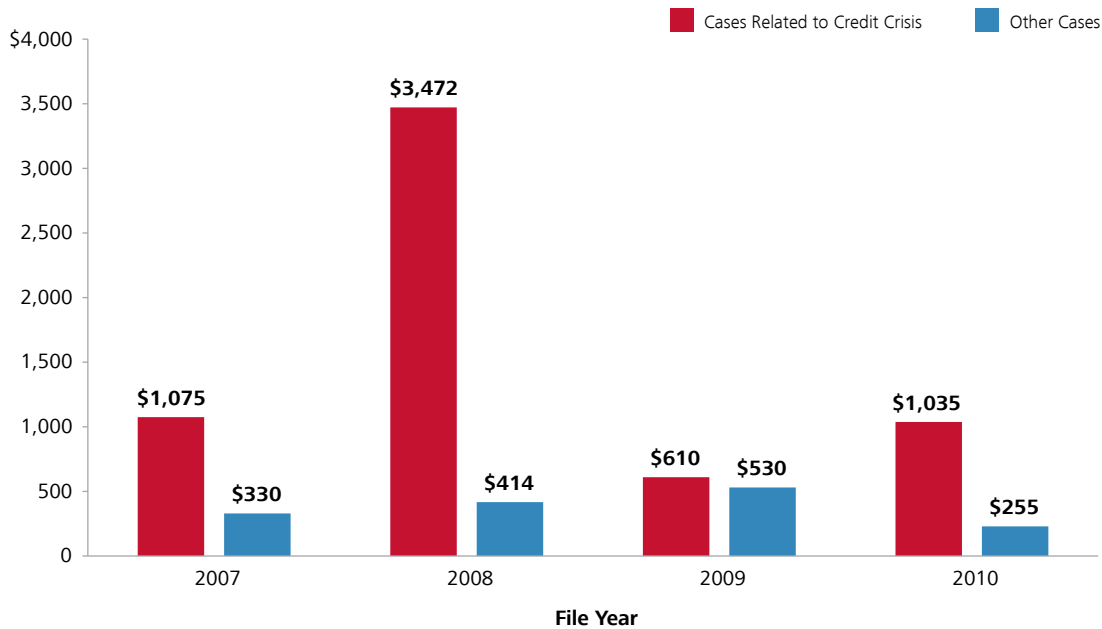
Figure 24. **Federal Filings Median Investor Losses (\$MM) By Settlement and File Year**



### Investor Losses for Cases Related to the Credit Crisis

Figure 25 compares median investor losses in credit crisis cases to median investor losses in other cases from 2007 to 2010. For 2010 filings, median investor losses related to the credit crisis exceeded median investor losses for other types of cases, as was the case over the prior three years (particularly in 2008).<sup>15</sup>

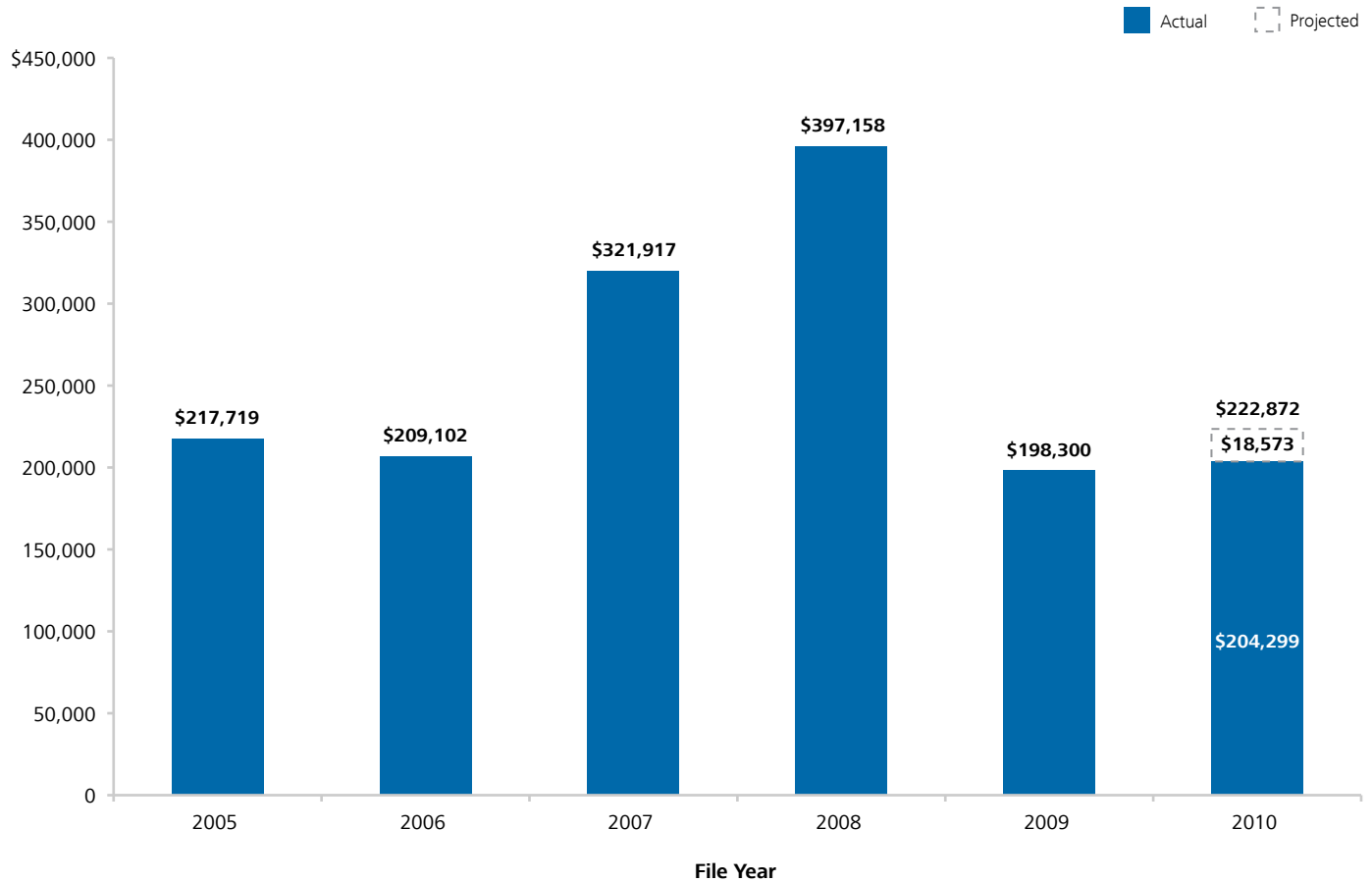
Figure 25. **Median Investor Losses (\$MM) for Cases Related to Credit Crisis and Other Cases by File Year**  
January 2007 – November 2010



**Notes:** Cases Related to Credit Crisis include subprime cases and auction-rate securities cases. Other Cases include standard and options backdating cases.

Aggregate investor losses for cases filed in 2010 are projected to reach nearly \$223 billion, exceeding last year's total but still considerably below the record set in 2008. See Figure 26.

Figure 26. **Aggregate Investor Losses (\$MM) by File Year**  
January 2005 – November 2010



## Conclusion

Filings recovered in the second half of 2010, due in large part to a resurgence of non-credit crisis-related filings. The anticipated decline in filings due to the *Morrison* decision did not materialize, although a spate of accounting-related filings against Chinese issuers with securities trading in the US may have offset any effect of the decision.

The median settlement reached an all-time high of \$11.1 million, exceeding \$10 million for the first time. The reduced level of investor losses in recently filed cases suggests that settlements may eventually fall from current levels, but the near future may bring some very large settlements as pending credit crisis cases with high levels of investor losses work their way through the litigation pipeline.

## Notes

The opinions expressed herein do not necessarily represent the views of NERA Economic Consulting or any other NERA consultant. Please do not cite without explicit permission from the authors.

\* This edition of NERA's research on recent trends in shareholder class action litigation expands on previous work by our colleagues Lucy Allen, Elaine Buckberg, Frederick C. Dunbar, Todd Foster, Vinita M. Juneja, Denise Neumann Martin, Ronald I. Miller, Stephanie Plancich, and David I. Tabak. We gratefully acknowledge their contribution to previous editions as well as this current version. The authors also thank Lucy Allen, Jake George, and Stephanie Plancich for helpful comments. In addition, we thank Benjamin Berman, Jiaqi Bian, John Diamond, David Gillen, Adelina Halim, Nikhil John, Nicole Roman, Sheena Siu, Carlos Soto, Min Zheng, and other NERA Securities and Finance Practice researchers for their valuable assistance with this paper. These individuals receive credit for improving this paper; all errors and omissions are ours.

<sup>1</sup> This paper reports on filings from January 1, 2010 through November 30, 2010. Any reference to filings in 2010 is intended to mean filings over that period. The paper reports on settlements that were approved by a court from January 1, 2010 through the date of publication and on settlements that were not yet approved as of publication but for which a court approval hearing was scheduled for a date in 2010. For settlements not yet approved, but which have an approval hearing scheduled in 2010, we assume that the settlement tentatively agreed to by the parties will be approved by the court on the hearing date.

<sup>2</sup> As described more fully below, investor losses are a rough proxy for plaintiffs' claimed damages. They can be calculated using public data and have historically been a powerful predictor of settlement size.

<sup>3</sup> Data on filings come from multiple sources, including RiskMetrics Group/Securities Class Action Services (SCAS), Dow Jones Factiva, Bloomberg Finance L.P., FactSet Research Systems, Inc., SEC filings, and the public press. In compiling our data, we seek information on all unique class actions alleging damages with regard to the purchase, ownership, or sale of securities. Most of our summary statistics below are based on data for cases filed in US federal courts. Until cases are consolidated, we report multiple filings that potentially are related to the same allegations if complaints are filed in different circuits. Similarly, until cases are consolidated, we report multiple filings if different cases are filed on behalf of investors in common stock and other securities. If cases are ultimately consolidated, the data are adjusted accordingly.

<sup>4</sup> See NERA Working Paper "Trends 2010 Mid-Year Study: Filings Decline as the Wave of Credit Crisis Cases Subsides, Median Settlement at Record High," by Jordan Milev, Robert Patton, Stephanie Plancich, and Svetlana Starykh, July 2010, at [http://www.nera.com/67\\_6813.htm](http://www.nera.com/67_6813.htm).

<sup>5</sup> Credit crisis-related class actions are those filed in or after 2007 with allegations relating to subprime mortgage loans, securities with such loans as collateral, adequacy of reserves, declines in real estate prices, the homebuilding industry, and structured products. The category also encompasses cases relating to the banking and financial crisis; these began to be filed in 2008. Also included are suits against credit rating agencies and litigation stemming from investments in auction-rate securities (ARS) and other structured products.

<sup>6</sup> Specifically, we define "standard filings" as filings in cases other than (a) recent filings in categories of special interest, namely credit crisis (including ARS), Ponzi schemes, and options backdating cases; and (b) earlier special categories of cases, namely IPO laddering, mutual fund market timing, and research analyst-related cases.

<sup>7</sup> A similar drop can be observed in the average time to file, which fell to 185 days (about six months) for cases filed in 2010, from 272 days (about nine months) for filings in the second half of 2009. The 2010 average was still somewhat higher than the average of 140 days (nearly five months) for cases filed from January 2007 through June 30, 2009.

<sup>8</sup> Most securities class action complaints have multiple allegations. All allegations are included in this analysis, so the total number of allegations exceeds the total number of filings.

<sup>9</sup> Our dismissal statistics include summary judgments and verdicts for defendants, but exclude partial dismissals. Due to the nature of dismissal data, on one hand, our dismissal counts in this section may be slightly overstated because they may include some dismissals without prejudice that will be reversed by amended and better-pled complaints, dismissals with prejudice that will be successfully appealed, or cases that will settle after a dismissal without prejudice and before the expiration date for plaintiffs to re-file an amended complaint. On the other hand, dismissal counts may be slightly understated because we currently do not count as dismissals those dismissals with prejudice that subsequently settled or reverted to pending status. These two effects tend to offset one another.

<sup>10</sup> Even this comparison overstates the incidence of cases going to trial, as the 28 post-PSLRA trials include 10 cases that were filed prior to the PSLRA.

<sup>11</sup> "Jury Finds Bankers Misled on Loan Risk," *Wall Street Journal*, November 19, 2010.

<sup>12</sup> Unless otherwise noted, tentative settlements (i.e., settlements announced by the parties but not yet approved by the court) and partial settlements (i.e., cases in which some but not all non-dismissed defendants have settled) are not included in our settlement statistics. As described above, one exception to this is that tentative settlements with a hearing for court approval that is scheduled after the publication of this report but during 2010 are included in the settlement numbers for 2010. We define "settlement year" as the year in which the first court hearing related to the fairness of the settlement occurred. For cases in which multiple defendants have settled, on different dates, the settlement year is the year of the first court fairness hearing date for the last defendant to settle.

<sup>13</sup> Our mid-year study reported a \$24 million average, after excluding outliers. The fact that the average for all of 2010 is substantially higher reflects a number of large settlements approved in the second half of 2010, such as the \$125 million settlement in the New Century securities litigation, the \$173 million settlement of the Maxim Integrated Products case, the \$235 million settlement in the Charles Schwab & Co. litigation, the \$624 million settlement in the Countrywide case, and the \$805 million settlement of HealthSouth class action.

<sup>14</sup> Technically, the investor losses variable explains more than half of the variation in the logarithm of settlement size. Investor losses are measured by comparing the return on the defendant company's stock to the return on the S&P 500 over the class period, and by using a proportional decay trading model to estimate the number of affected shares of common stock.

<sup>15</sup> In our mid-year study, we had reported that median investor losses for credit crisis cases filed in the first half of 2010 fell below median investor losses for other types of cases. However, from July through November 2010, a number of credit crisis-related cases were filed with investor losses exceeding \$1 billion, pushing the median for credit crisis cases up, and several non-credit crisis cases were filed with relatively low investor losses, pushing that median down.

## About NERA

NERA Economic Consulting ([www.nera.com](http://www.nera.com)) is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For half a century, NERA's economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. We bring academic rigor, objectivity, and real world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance, and litigation.

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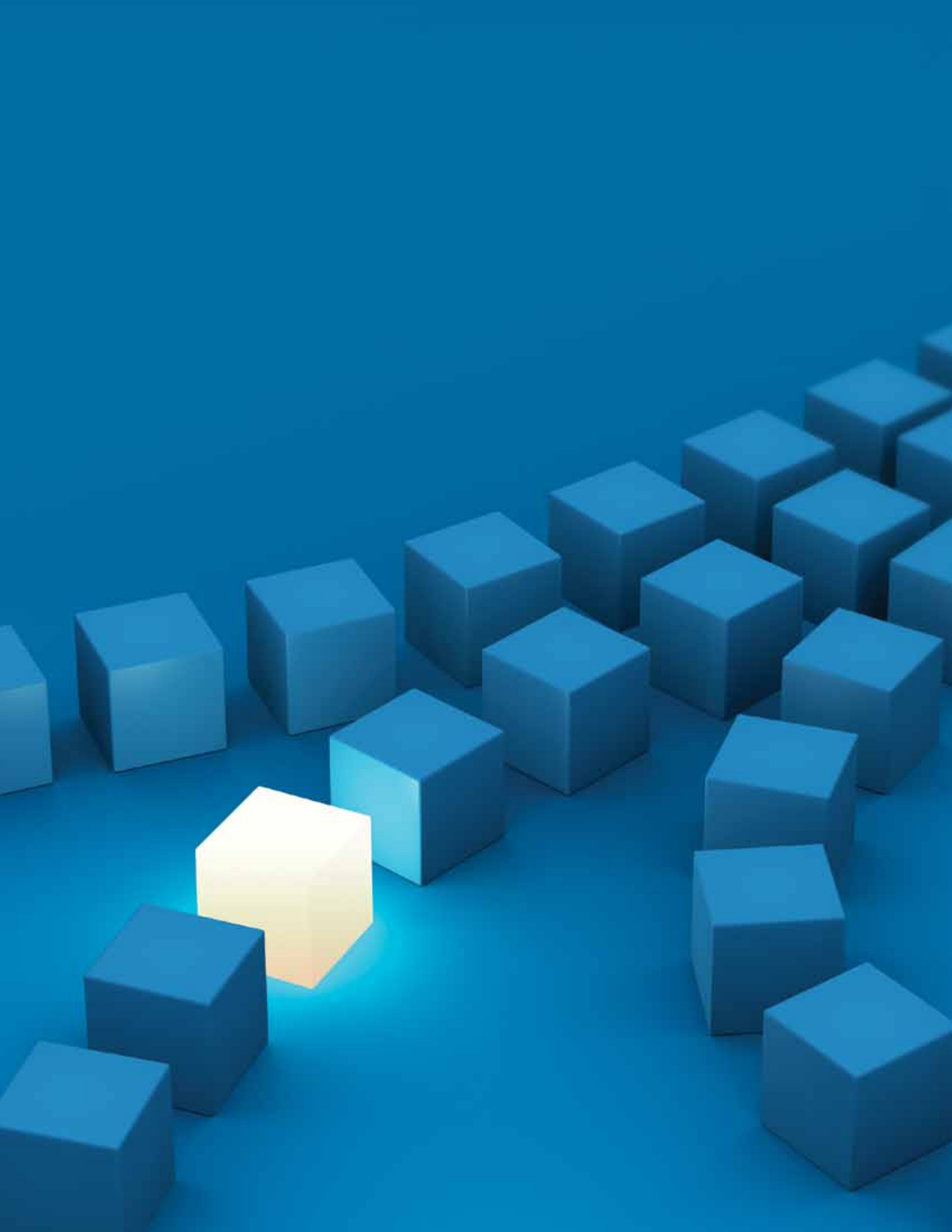
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