Trends in Canadian Securities Class Actions: 2011 Update
Pace of Filings Grows, Pace of Settlements Slows

By Bradley A. Heys and Mark L. Berenblut
It now seems beyond question that the uptick in securities class action filings since 2008 is not a transient phenomenon.
Trends in Canadian Securities Class Actions: 2011 Update
Pace of Filings Grows, Pace of Settlements Slows

By Bradley A. Heys and Mark L. Berenblut

31 January 2012

Introduction

In 2011 we saw 15 new securities class action cases filed in Canada—more than in any previous year. Only two cases settled during the year, leaving at least 45 active Canadian securities class actions as of 31 December 2011. These cases represent a total of approximately $24.5 billion in outstanding claims.

Nine of the 15 new cases are so-called “Bill 198” cases, being those which include claims in respect of an issuer’s continuous disclosure obligations pursuant to Part XXIII.1 of the Ontario Securities Act (OSA) and/or analogous provisions of the other provincial securities acts.

A total of 35 Bill 198 cases have been filed since these new provisions came into force at the end of 2005. Of these, 24 remain unresolved, 10 have settled, and one has been dismissed. Of the 24 currently active cases, leave to proceed has been granted in two cases. The 10 settlements have resulted in payments by defendants totalling nearly $100 million.

It now seems beyond question that the uptick in securities class action filings since 2008 is not a transient phenomenon. In each of the last four years we have seen at least nine new cases filed—more than in any prior year. Not surprisingly, this trend has been driven by filings of Bill 198 cases, which account for more than two-thirds of the 46 new cases filed between 2008 and 2011.

This trend may continue in 2012 and beyond. Upward pressure on the pace of Canadian securities class action filings, and the associated dollar value at risk, may result from:

• what appears to be continued growth in the Canadian class action bar in terms of both firms and lawyers bringing and defending these cases;

• rulings granting certification and leave of the court in the first few Bill 198 cases to reach that stage;¹

• the success of class counsel in reaching multi-million dollar settlements (and class counsel fee awards); and

• the limits to claims in US courts for non-US investors in non-US stocks making Canada a more attractive venue for these cases.⁴
Trends in Filings

New Cases
Fifteen new securities class actions were filed in 2011. This is more than in any prior year and exceeds the previous high of 12 filings in 2008. See Figure 1.

Figure 1. Cases Filed by Year
1997—2011

Note: “Responsible Issuer Case” refers to a case brought by investors in securities (e.g., common shares) issued by a Responsible Issuer as that term is defined in the OSA. “Bill 198 Case” refers to a case brought under the continuous disclosure provisions of the provincial securities acts.
Nine of the 15 new cases in 2011 are Bill 198 cases—one more than the eight Bill 198 cases in 2010. See Figure 2.

Figure 2. “Bill 198” Filings  
2006—2011

Total: 35 Cases Filed
Bill 198 cases filed during 2011 include the claims made against the following issuers:

- Alange Energy
- Armtec Infrastructure Inc.
- BCE Inc.⁷
- Canada Lithium Corporation
- Cathay Forest Products
- Eastern Platinum Limited
- North American Palladium
- Sino-Forest Corporation
- Zungui Haixi Corporation

Of the six other filings made during 2011, one (against SMART Technologies) is a shareholder class action involving prospectus claims (i.e., those related to the primary, as opposed to secondary, market), one (against Baffinland Iron Mines) is related to a takeover bid, two involve allegations related to the management of investment funds, and two involve allegations of a Ponzi scheme.

Interestingly, there has been at least one Ponzi scheme case in each of the last four years. Although the absolute number of such cases on its own is too small to suggest a trend, these filings coincide with the recent wave of Ponzi scheme cases south of the border. Those cases, which began with the revelation of the Bernard Madoff scandal in December 2008, appear, at least in part, to have resulted from the challenge to the perpetrators of sustaining such schemes during an economic downturn.⁸ While at least one of these Canadian cases is related to a well-publicised US Ponzi scheme, most appear to be Canadian-made.⁹

Two of the cases filed in 2011 involved claims of $1 billion or more. The filing against Baffinland Iron Mines in relation to its acquisition by ArcelorMittal claims $1 billion in general and special damages to the proposed class members.¹⁰ The filings against Sino-Forest claim between approximately $4 billion and $7.4 billion in damages to shareholders (including claims for punitive damages).¹¹

**Filings against Chinese Companies**

One of the major trends that drove filings of securities class actions in the US during 2011 is claims against Chinese companies whose shares are listed on North American exchanges.¹²

The case against Sino-Forest reflects this new trend and made headlines in both Canada and the US during 2011. In Canada, in addition to the Sino-Forest case, filings were made against two other Chinese companies whose shares trade on the TSX Venture Exchange: Zungui Haixi Corporation and Cathay Forest Products Corp. The filing against Sino-Forest is among the most high-profile of the suits brought against Chinese companies on either side of the border.

In response to the issues raised with respect to these and other companies, the Ontario Securities Commission announced in July 2011 that it is “conducting a targeted review of Ontario reporting issuers listed on Canadian exchanges and having significant business operations in emerging markets.” It noted that its review “is designed to closely examine the disclosure of certain issuers from those markets and the vehicles through which these companies have accessed the Ontario market...[and] will also focus on the role of the auditors and underwriters.”¹³
Interestingly, the case against Canadian Solar Inc.—which was filed in August 2010—also involves a company with its main place of business and operations located in China, although its shares are listed on the NASDAQ in the US and not on a Canadian exchange. As mentioned last year, this case is the second class action brought under Canadian securities laws against a company whose securities are not listed on a Canadian exchange. The court in that case has, so far, allowed the case against Canadian Solar to proceed, having found that the company is a “responsible issuer” as that term is defined under Part XXIII.1 of the OSA.  

Filings by Province
Not surprisingly, Ontario continues to be the venue for the vast majority of Canadian shareholder class action filings. In 2011, 12 of the 15 new cases were filed in Ontario. Of these new cases filed in Ontario, one was also filed in Quebec and Saskatchewan (Sino-Forest), while another was also filed in Quebec (Armtec). Among the new cases in 2011 without an Ontario filing, two cases were filed only in Quebec, and one case was filed only in Alberta.

Since 1997, 68 of 89 (or 76%) of the cases currently in our database were filed in Ontario. Of these, 17 also involved parallel filings in other provinces. In that same period, 21 cases have been filed in Quebec and 11 have been filed in Alberta. All cases filed in multiple provinces include at least one filing in Ontario.

Of the 35 Bill 198 cases filed to date, 33 have been filed in Ontario. Of these, eight were also filed in at least one other province: four in Quebec, one in Quebec and Saskatchewan, one in Quebec and British Columbia (BC), one in BC, and one in Alberta. There have been two Bill 198 cases which were not filed in Ontario—one in each of Quebec and BC.

The pattern of filing jurisdiction for Ponzi scheme cases differs from Bill 198 cases. Only one Ponzi scheme case has been filed in multiple jurisdictions (Alberta and Ontario), and of the seven other such cases currently in our database, three were filed in Alberta, three in Quebec, and one in Ontario.

US Securities Class Actions against Canadian Companies
In last year’s Trends update we mentioned that many Canadian companies also face the risk of class action litigation south of the border, and many of these cases correspond to (and some are coordinated with) parallel actions in Canada. We also noted that US litigation risk for Canadian companies may be somewhat reduced following the June 2010 decision by the US Supreme Court in Morrison v. National Australia Bank, which places limits on US private securities litigation relating to trading of securities outside the US. However, US filings against Canadian-domiciled issuers almost always involve those with securities listed on a US exchange. As such, any impact of Morrison on these cases will likely relate more to the scope of the class and the size of any payments made by defendants (whether by way of settlement or judgment) to resolve the cases than to the number of filings.
Indeed, in 2011 five Canadian-domiciled companies were named as defendants in six securities class action filings in the US, up from the three cases filed in each of 2009 and 2010 but less than the eight cases filed in 2008.\footnote{17} The 2011 filings against Canadian companies include the cross-border case against SMART Technologies—with one filing in each of the 7th and 9th US circuit courts in addition to the filing in Ontario. Other Canadian companies named as defendants in US cases during 2011 include Research in Motion, Fairfax Financial, Agnico-Eagle Mines, and Oilsands Quest Inc.

Since 1997, Canadian-domiciled companies have been named as defendants in 74 US securities class action filings. Of these, 21 (28\%) also had parallel class actions in Canada.\footnote{18} However, prior to the Bill 198 amendments to the OSA, there were few Canadian securities class actions. Since those amendments came into force at the end of 2005, 46\% of the 26 US filings against Canadian-domiciled companies also had parallel class actions in Canada. See Figure 3.

**Figure 3. US Filings against Canadian-Domiciled Companies**

- **1997—2005**
  - No Parallel Canadian Action: 41 Filings (85\%)
  - With Parallel Canadian Action: 7 Filings (15\%)
- **2006—2011**
  - No Parallel Canadian Action: 14 Filings (54\%)
  - With Parallel Canadian Action: 12 Filings (46\%)

**Note:** If multiple US federal court cases are filed against the same defendant, are related to the same allegations, and are in the same circuit, we treat them as a single filing. However, multiple actions filed in different circuits are treated as separate filings. We have counted each US filing as having a parallel Canadian action where there is at least one Canadian action against the same defendant and involving similar allegations. In some instances, more than one US filing relates to a single Canadian action.
To date, 59 of the 74 US filings against Canadian companies since 1997 have been resolved; 19 have been dismissed by US courts and 40 have settled. There are currently 15 active US securities class action filings against Canadian-domiciled companies. See Figure 4. Four of these companies—Celestica, IMAX, Manulife Financial, and SMART Technologies—have also been named as defendants in parallel Canadian actions.

Figure 4. **Status of US Filings against Canadian-Domiciled Companies, as of 31 December 1997—2011**

![Bar chart showing the status of US filings against Canadian-domiciled companies from 1997 to 2011.](chart.png)
Figure 5. **Filings by Industry Sector (89 cases)**

1997—2011

- Finance: 28.1%
- Non-Energy Minerals: 18.0%
- Energy Minerals: 7.9%
- Electronic Technology: 6.7%
- Producer Manufacturing: 6.7%
- Communications: 5.6%
- Consumer Non-Durables: 5.6%
- Consumer Services: 5.6%
- Health Technology: 3.4%
- Forestry: 2.2%
- Other: 9.0%

**Industry Sectors**

More than half of all Canadian securities class action filings to date have been brought against defendants in the financial sector or the energy and non-energy minerals sectors. See Figure 5.

Filings in 2011 were generally consistent with this historical pattern. Five of the 15 new Canadian securities class actions filed in 2011 were brought against companies in the minerals sectors and four were brought against companies operating in the finance sector. Two were brought against forestry companies—namely, the cases against the two Chinese forestry companies mentioned above, Sino-Forest and Cathay Forest Products.

**Time to Filing**

The time from the end of a proposed class period to the date a claim is first filed continues to vary widely across cases. In 2011, the average time to filing was about 10.5 months from the end of the proposed class period. However, nine cases were filed within six months of the end of the proposed class period and one was filed in just over six months. Four of the cases brought in 2011 were filed more than two years after the end of the proposed class period.

The median time to filing for cases filed was significantly lower in 2011 at just under three months, down from approximately 12 months for cases filed in 2010.

This decline in the median time to filing from 2010 to 2011 may signal a return to the general pattern of faster filings observed since 2007. See Figure 6.

As previously reported, between 2003 and 2006 half of all cases were filed within approximately six months of the end of a proposed class period. Since 2007, the median time to filing has fallen to just under four months. Last year we mentioned that it will be interesting to observe whether increasing competition amongst class counsel results in cases being filed more quickly going forward. It is possible that 2010 was an outlier year in terms of time to filing, with five of the 10 cases being filed more than a year after the end of the proposed class period.

Although we did see a shorter median time to filing and competition amongst class counsel for carriage of at least two cases (in the cases against Armetec and Sino-Forest) during 2011, there is clearly great variation in the time to filing across cases. In view of this it remains to be seen whether this is a trend that will continue.
The decline in the median time to filing from 2010 to 2011 may signal a return to the general pattern of faster filings observed since 2007.
Trends in Resolutions

Settlements
Two cases settled in 2011 for total payments by defendants of $58.6 million. This includes the actions against Norbourg Asset Management—which (as noted in last year’s update) settled early in 2011 for $55 million—and Redline Communications Group, which settled for $3.6 million.

The Norbourg settlement, combined with prior recoveries of $31 million from the investor compensation fund of the Autorité des Marchés Financiers (AMF) and $26 million in asset sales and tax refunds, will result in the near-full recovery for the 9,200 victims of what has been described as one of the biggest financial frauds in Canadian history. Twenty million of the $55 million settlement was paid by the AMF.

Our database now includes settlement data for 35 Canadian securities class actions. The average settlement across these cases is approximately $110 million, but this figure is heavily skewed by large settlements in the Nortel class actions. The median settlement is $12.5 million.

Settlement value as a percentage of the total damages claimed (including both claims for compensatory and punitive damages as set out in the Statement of Claim) in these cases averaged 17.5%. The median settlement value as a percentage of claimed damages is 8.8%.

Settlements in “Bill 198” Cases
To date, there have been 10 settlements in Bill 198 cases. The average settlement amount in these cases is $10.0 million; the median is $6.2 million—down slightly from the figures we reported last year. On average, these settlements represent approximately 10.7% of the total damages set out in the Statement of Claim. As reported last year, the four cases that also involved parallel US claims settled for an average of approximately $16.9 million, or approximately 12.3%, of total damages claimed. The other six domestic-only cases settled for an average of $5.3 million (or 9.6% of total damages claimed), with three of the six settling for $2.2 million or less.

Given the small number of settlements to date, it is not clear whether these are indicative of the size of settlements that should be expected in the future. It will be interesting to observe settlement amounts and the factors that seem to influence those amounts as more Bill 198 cases are resolved.

Denial of Leave to Commence a “Bill 198” Action
In 2011, the Supreme Court of British Columbia denied leave to commence an action against MacDonald, Dettwiler and Associates under Part 16.1 of the BC Securities Act (the analogous provisions to Part XXIII.1 of the OSA). This is the first such application to be heard in BC and the first case in Canada where leave to proceed has been denied. The court declined to grant leave on the basis that all of the material facts alleged occurred prior to the secondary market liability provisions coming into force, the fact that the lead plaintiff did not purchase her shares in the secondary market, and that she did not acquire any shares until after the relevant period.
Pending Cases

There are now 45 active Canadian securities class actions as of 31 December 2011. See Figure 7. These cases represent more than $24.5 billion in outstanding claims (including claims for punitive damages). The two largest damage claims are the $10 billion claim against CIBC and the approximately $7.4 billion claim against Sino-Forest. Excluding these cases, the remaining 43 cases represent more than $7.1 billion in claims.

As we have previously noted, cross-border cases tend to involve larger claim amounts. Indeed, excluding the claim against CIBC, there are six active cross-border cases (approximately 13% of active cases) representing approximately $1.7 billion in claims—nearly one-quarter of the $7.1 billion in total claims excluding the claims against CIBC and Sino-Forest.

Figure 7. Active Cases as of 31 December 2011
1997-2011

There are 34 active domestic-only securities class actions that have been brought against companies domiciled in Canada. These 34 cases represent total claims of more than $5.3 billion. This amount excludes cross-border cases, cases brought against Chinese companies, and cases brought against companies listed only on a US exchange but alleged to be liable as “responsible issuers” as defined in Part XXIII.1 of the OSA.
Of the 45 active cases, nearly half were filed in the last two years and almost two-thirds were filed within the last three years. See Figure 8.

Twenty-four of these cases (or 53%) are Bill 198 cases. These cases represent more than $21 billion in total claims. Two of these—the cases against IMAX and Arctic Glacier—have been granted leave to proceed with these claims and have been certified as class actions.27

Figure 8. **Status of Cases by Year of Filing, as of 31 December**
1997—2011

![Bar chart showing the status of cases by year of filing, as of 31 December, 1997—2011. The chart indicates the number of filings for each year, with categories for Dismissed, Settled, and Active cases. The total number of cases filed is 89.]
Looking Forward

The number of filings and the total number of outstanding Canadian securities class actions both reached new highs in 2011. The increase in securities class actions filings since 2008 appears to be more than a transient phenomenon: we have seen at least nine new cases filed in each of the last four years—more than in any prior year. Not surprisingly, this trend has been driven by filings of Bill 198 cases.

This upward trend seems likely to continue at least through 2012. Several factors suggest we are likely to continue to see an increasing number of new cases filed and a shorter time to filing. Among these are future rulings in leave applications, certification motions, trial judgments in Bill 198 cases (and possibly other class action proceedings), and the impact of Morrison on claims in US courts against Canadian companies. It remains to be seen what impact these factors will have on the size of settlements and the point during a litigation at which settlements are reached.

Several factors suggest we are likely to continue to see an increasing number of new cases filed and a shorter time to filing.
Notes

1. Brad Heys is a Vice President and Mark Berenblut is a Senior Vice President with NERA Economic Consulting. We thank Vinita Juneja, Robert Staley, and Jake George for helpful comments on earlier drafts. We also thank Jacob Dwhytie and James Mancini for their valuable research assistance with this paper. We gratefully acknowledge the contributions of Svetlana Starykh to this and previous editions of this study. These individuals receive credit for improving this paper. All errors and omissions are our responsibility.

2. Unless otherwise noted, all dollar amounts are expressed in Canadian dollars. Claim amounts are the total of compensatory and punitive damages expressed in the Statements of Claim for each case.

3. In particular, the rulings in Silver v. Imax Corporation et al., and Dobbie v. Arctic Glacier Income Fund et al.

4. Resulting from the decision in Morrison et al. v. National Australia Bank Ltd. et al., 130 S. Ct. 2869 (2010) (Morrison), and subsequent cases.

5. Our database includes Canadian class actions brought on behalf of a class of investors in securities. This includes class actions brought by investors in shares of reporting issuers, as well as those brought by investors in other securities such as mutual fund units or investment certificates offered by investment managers. In compiling filing data, we have sought information on all unique class actions brought by investors in securities. We report a single filing where multiple causes of action have been commenced in respect of substantially similar facts.

6. The following cases, which were not included in our 2010 update, have been added to our database this year based on information not previously available to us: HMS Financial (filed in 2005), ABC Wilderness (filed in 2007), BigKnowledge (filed in 2008), Mount Real Corp. (filed in 2008), Birch Mountain Resources (filed in 2010), and MacDonald Dettwiler (filed in 2010).

7. A new claim was filed in Ontario against BCE Inc. during 2011. This case is separate from the claim filed against the company in 2008 in Saskatchewan.


9. A case involving the Stanford Investment Bank derives from one of the largest ever Ponzi schemes, which is the subject of various legal proceedings in the US. Other Canadian Ponzi scheme cases are those relating to Mount Real Corp., Shire International Real Estate Investment Ltd., Earl Jones, Oversea Chinese Fund, and Peers Foster Kristiansen Inc.


11. There have been several claims made against Sino-Forest in Ontario and Quebec with varying class definitions and damage claims, including: Smith, et al. v. Sino-Forest Corporation, et al. [Ontario] ($5.32 billion); Laboureurs’ Pension Fund v. Sino-Forest Corporation, et al. [Ontario] ($7.4 billion); Northwest & Ethical Investments L.P., et al. v. Sino-Forest Corporation, et al. [Ontario] ($5.8 billion); and Liu, et al. v. Sino-Forest Corporation, et al. [Quebec] ($4 billion). We are also aware of a claim filed against Sino-Forest in Saskatchewan in December 2011, but the Statement of Claim has not yet been made available to us.

12. Infra, n8.


16. The likely impact of Morrison on cross-border shareholder class actions, including those involving companies domiciled in Canada, Europe, and other countries, is discussed in more detail in Elaine Buckberg and Max Gulker, “Cross-Border Shareholder Class Actions Before and After Morrison,” NERA Economic Consulting Working Paper, 16 December 2011.

17. Our US database records multiple filings where actions are filed against the same defendant in more than one federal court circuit (unless they are subsequently consolidated).

18. This figure does not include other cross-border cases involving defendants who are not Canadian-domiciled companies.

19. Two companies are named in two separate US filings.

20. On 27 January 2012 it was announced that Imax Corp. agreed to pay $12 million to settle the US class action. Stendahl, Max, “Imax Investors Reel In $12M in Securities Action,” Law360, 27 January 2012.


22. Where there is more than one Statement of Claim, we have used the largest total damage claim in calculating settlement percentages.


24. Based on claim amounts for the 38 cases for which the Statement of Claim is available to us.

25. As noted above, there are four Canadian companies facing cross-border class action claims. In addition, there are two Canadian cases involving non-Canadian companies (AIG and Stanford Investment Bank). The US action against CIBC has been dismissed, although the Canadian case is still pending.

26. Based on information available for 22 of the 26 active Bill 198 cases.

27. A case against Manulife has also been authorized as a class action in Quebec.
NERA has been analyzing trends in shareholder class action litigation for nearly 20 years, and we publish several studies annually examining class action litigation trends around the world. We produce two reports analyzing US trends each year, as well as annual reports on trends in Australia, Japan, Italy, and Canada. We also produce bi-annual reports on settlement trends in US Securities and Exchange Commission (SEC) enforcement actions, and issued our first report on enforcement actions in the UK in July 2011. This overview summarizes the most recent edition of each of these reports.
Securities Class Actions: US

The year-end edition of NERA’s semi-annual study of US federal securities class action filings showed that the pace of filings of class actions under federal securities and commodity laws held relatively steady in 2011 as compared to the previous three years. Co-authored by Senior Consultants Dr. Jordan Milev, Robert Patton, and Svetlana Starykh and Senior Vice President Dr. John Montgomery, the study includes data on filings and dismissals through 30 November 2011, and settlements through 31 December 2011. The latest edition showed that filings were projected to reach 232 cases by year’s end, broadly in line with levels observed in 2010 (241), in 2009 (218), and in 2008 (245). Filings ultimately totaled 221 in 2011. Suits objecting to a merger or an acquisition accounted for 29% of filings through November 2011, and filings against Chinese companies accounted for approximately 18%.

While shareholder filings continue to be filed at a relatively steady level as compared to the past three years, there has been a substantial shift in the composition of suits filed. A surge in cases involving Chinese companies listed in the US and in M&A objection suits, along with a waning of credit-crisis cases, has been driving this trend. Filings against foreign-domiciled issuers reached 64 through November 2011, more than double the annual count observed in recent years. This surge in suits is largely attributed to the surge in filings against Chinese companies. Through November 2011, there had been a total of 29 filings against Chinese-domiciled firms. However, this number understates the number of Chinese firms targeted, as not all companies based in China are legally domiciled there. When including Chinese companies that are either domiciled in China or have their principal executive offices in the country, there had been 39 suits against Chinese companies in the first 11 months of 2011.

Federal Filings January 1996 – November 2011

![Federal Filings Chart]

Note: Other Cases include IPO laddering, mutual fund market timing, and research analyst-related cases.
SEC Enforcement Actions: US

The 2011 year-end report from NERA’s ongoing analysis of trends in SEC enforcement action settlements finds that the SEC reached a total of 682 settlements in fiscal year 2011 (FY11), almost unchanged from 680 settlements in fiscal year 2010. However, while the total number of FY11 settlements remained relatively constant, there has been a substantial shift in the composition of allegations. Since FY09, Trends authors have observed an increase in settlements with financial services firms for misrepresentations to customers or misappropriation of funds, and an offsetting decrease in settlements relating to public company misstatements.

The authors—Senior Consultant Dr. Max Gulker, Senior Vice President Dr. Elaine Buckberg, and Vice President Dr. James A. Overdahl—note that the three-year rise in the percentage of SEC settlements involving misrepresentations or misappropriation by financial services firms suggests a shift in the SEC’s enforcement focus since the financial crisis began and the Madoff fraud was revealed. These types of settlements accounted for 41.6% of all SEC settlements in FY11, as compared to the FY03-08 average of 23.7%. Illegal offering and market manipulation cases were the second most common in FY11, representing 27.3% of settlements, the highest level since 2005. Public company misstatement settlements continued to decline for a fourth consecutive year, to 10.4% of total settlements, the lowest level since Sarbanes-Oxley was passed.

Number of Settling Defendants Remained Relatively Flat in FY2011

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Settlements</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>667</td>
</tr>
<tr>
<td>2004</td>
<td>586</td>
</tr>
<tr>
<td>2005</td>
<td>629</td>
</tr>
<tr>
<td>2006</td>
<td>483</td>
</tr>
<tr>
<td>2007</td>
<td>503</td>
</tr>
<tr>
<td>2008</td>
<td>498</td>
</tr>
<tr>
<td>2009</td>
<td>419</td>
</tr>
<tr>
<td>2010</td>
<td>520</td>
</tr>
<tr>
<td>2011</td>
<td>484</td>
</tr>
</tbody>
</table>

The chart above shows the number of settlements involving companies and individuals from 2003 to 2011. The number of settlements involving companies has remained relatively flat, while the number of settlements involving individuals has slightly decreased.
In the first edition of this new NERA report examining trends in regulatory enforcement in UK financial markets, Vice President Paul Hinton and Senior Consultant Robert Patton find that UK financial enforcement activity has reached record levels as measured by the number and aggregate amount of fines imposed. However, behind these headline figures is a more nuanced picture. Aside from a handful of recent fines that are among the largest ever imposed, the authors report that the average size of fines has actually declined slightly. The Financial Services Authority (FSA) is imposing more fines than ever before, but not across the board: while enforcement has targeted certain conduct, such as unsuitable investments and mis-selling, market abuse cases against firms remain rare.

In addition to a detailed analysis of trends since April 2002, the authors provide background on the role of financial penalties in enforcement, discussion of recent developments in enforcement, and a look ahead to expected changes in enforcement policy in the UK. Among other key findings, the report shows that aggregate fines assessed by the FSA rose to £98.6 million in the 2010/2011 fiscal year from £33.3 million in 2009/2010. The number of fines nearly doubled in 2010/11 as compared to the previous year, for both firms and individuals. For individuals, the number of fines assessed in 2010/11 was more than 10 times the average over the six years prior to 2008/09, before the FSA adopted a more assertive enforcement stance. However, it is difficult to predict whether these trends will continue. For example, of the £98.6 million in fines imposed in 2010/11, £64 million was assessed in just four cases. As the circumstances giving rise to the very largest fines are typically idiosyncratic, it is possible that aggregate fines will decline next year absent several of the types of cases that give rise to exceptionally large fines.
Securities Litigation: Japan

NERA’s latest report from Japan finds that the total number of judgments in securities litigation in Japan increased to a record 56 cases in 2010, up from 39 in 2009. However, despite the record total, the number of cases involving “misstatement” allegations in Japan decreased substantially to seven in 2010, from 14 in 2009. Co-authored by Vice President Makoto Ikeya and Consultant Satoru Kishitani, the report notes that the decline in misstatement judgments can largely be attributed to the resolution of several important cases that involved numerous institutional and individual investors—including Livedoor and Seibu Railway.

In addition, although the number of misstatement judgments declined, the number of regulatory actions by the Securities and Exchange Surveillance Commission (SESC) resulting in monetary penalties for misstatements increased to a record high of 12 in 2010, from nine in 2009. This suggests that the number of misstatement cases may be expected to rise again in the future, as SESC decisions are early indicators of misstatements litigation. The report also notes that broker-customer disputes spiked significantly in 2010, to a record 44 cases—nearly twice the prior year total of 23. Of these cases, 27% or 12, involved unlisted stock trading, the most frequent allegation cited. The report reviews statistics from 1998 through 2010.

Civil and Criminal Judgment Cases by Year and Type

![Chart showing the number of judgment cases by year and type from 1998 to 2010.](chart_image)

Sources: WestLaw Japan, Newspaper articles
Securities Class Actions: Australia

Securities class action filings in Australia set a new record in 2009, breaking the previous record set in 2008. A key factor in the recent increase in filings was a change in the way securities class action litigation is funded in Australia, according to the 2010 study, authored by Director Greg Houston, Senior Consultant Svetlana Starykh, former Consultant Astrid Dahl, and former Analyst Shane Anderson. Until only a few years ago, there was a strong disincentive to bring an action due to the risk of incurring significant legal costs. The emergence of commercial litigation funding has improved the incentive for and ability of investors to participate in class actions. In light of the growing environment for securities class action litigation in Australia, this study examines for the first time trends in Australian securities class actions.

The study finds that the six Australian class action filings in 2009 bring the total for 2007-2009 to 14—exactly half the total number of filings since the first securities class action case was filed in Australia in the early 1990s. Since 2005, the majority of class actions have been financed by a commercial litigation funder. According to the study, more than half the securities class actions filed between 1999 and 2009 alleged either misleading or deceptive conduct, or failure by companies to disclose promptly information material to the value of their securities. The study also finds that settlement is the most likely outcome of securities class action cases in Australia. Eight of the 12 class actions resolved by the end of 2009 were settled. This trend has become more pronounced in recent years—all of the resolved cases filed after 2003 were settled.


<table>
<thead>
<tr>
<th>Year</th>
<th>Continuous Disclosure and/or Misleading and Deceptive Conduct Cases</th>
<th>Other Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>1994</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>1995</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>1996</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>1997</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>1998</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>1999</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>2000</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>2001</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>2002</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>2003</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>2004</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>2005</td>
<td>6</td>
<td>4</td>
</tr>
<tr>
<td>2006</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>2007</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>2008</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>2009</td>
<td>6</td>
<td>2</td>
</tr>
</tbody>
</table>
Class Actions: Italy

In addition to tracking securities class action trends across the world, we also track consumer class action trends in Italy, where suits include contract, product liability, antitrust/competition suits, and others. On 1 January 2010, it became possible to file consumer class actions in Italy. Several filings claiming billions of euros in damages followed the new law. Since then, the pace of filings has slowed down somewhat. Both Italian and foreign companies have been called to the mat. This paper, authored by Senior Consultants Dr. Renzo Comolli and Dr. Massimiliano De Santis and former NERA Director Dr. Francesco Lo Passo, provides an overview, from an economic perspective, of the first eight months of the Italian class action experience.

The authors focus on the economic incentives created by the law and by the role of consumer associations as de facto plaintiffs. In particular, because consumer associations are nonprofit and do not stand to gain directly from a settlement or damage award, they may not necessarily aim to maximize settlements or recoverable damages. The authors analyze the goals that consumer associations seem to pursue and derive the implications that these have for damage claims and future settlements. In addition, the paper reviews some of the damages claims from recent actions and finds that, while large, they don’t appear to be consistent with the opt-in model of the Italian class action.

Italian Consumer Class Actions Filed 1 January 2010 – 31 August 2010

<table>
<thead>
<tr>
<th>Consumer Association</th>
<th>Defendant</th>
<th>Matter</th>
</tr>
</thead>
<tbody>
<tr>
<td>Codacons</td>
<td>Intesa San Paolo</td>
<td>Bank fees</td>
</tr>
<tr>
<td>Codacons</td>
<td>Unicredit</td>
<td>Bank fees</td>
</tr>
<tr>
<td>Codacons</td>
<td>Voden Medical Instruments</td>
<td>Flu vaccine</td>
</tr>
<tr>
<td>Codacons</td>
<td>British American Tobacco Italia</td>
<td>Tobacco</td>
</tr>
<tr>
<td>Unione Nazionale Consumatori</td>
<td>Wecantour</td>
<td>Travel</td>
</tr>
<tr>
<td>Adoc</td>
<td>Banca Popolare di Novara</td>
<td>Bank fees</td>
</tr>
</tbody>
</table>

These and other past and future NERA trends reports can be viewed on our Securities Litigation Trends website at www.securitieslitigationtrends.com.
About NERA

NERA Economic Consulting (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.

NERA’s clients value our ability to apply and communicate state-of-the-art approaches clearly and convincingly, our commitment to deliver unbiased findings, and our reputation for quality and independence. Our clients rely on the integrity and skills of our unparalleled team of economists and other experts backed by the resources and reliability of one of the world’s largest economic consultancies. With its main office in New York City, NERA serves clients from more than 20 offices across North America, Europe, and Asia Pacific.

Contact
For further information, please contact:

**Bradley A. Heys**
Vice President
+1 416 868 7312
brad.heys@nera.com

**Mark L. Berenblut**
Senior Vice President
+1 416 868 7311
mark.berenblut@nera.com

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.