PAYING-TO-PLAY IN SECURITIES CLASS ACTIONS: A LOOK AT LAWYERS' CAMPAIGN CONTRIBUTIONS

Drew T. Johnson-Skinner*

Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA) to reduce plaintiffs' lawyers' influence in securities fraud class actions. The PSLRA's presumption that the class member with the largest financial interest would be named lead plaintiff was meant to place the class, instead of its lawyers, in charge of the litigation. Congress hoped that institutional investment funds, such as public pension funds, would serve as the new lead plaintiffs. At first, it seemed that the PSLRA was successful at installing institutional investors as lead plaintiffs and reducing the power imbalance between class counsel and their clients.

Today there are new fears that plaintiffs' lawyers have co-opted securities class actions by paying-to-play. "Paying-to-play" describes the practice of lawyers making campaign contributions to public pension funds' political leadership in order to gain favorable consideration by the funds for appointment as class counsel. Many reforms have been proposed and enacted in response to paying-to-play fears. Aside from a few anecdotal reports, however, no examination of campaign contributions from plaintiffs' lawyers to elected officials exists in the legal literature. This Note presents the first comprehensive report on campaign contributions that serve as the basis for paying-to-play concerns. My data suggest that law firms do indeed contribute to the investment funds that select them as class counsel, ruling out one possible response to paying-to-play fears, namely, that these contributions are not being made in the first place. This Note also provides guidance for future research, and in doing so, touches upon issues such as the reasons that firms donate and how funds make counsel-selection decisions.

Introduction

Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA)[1] to reduce plaintiffs' lawyers' influence in securities fraud class actions. Before the PSLRA's passage, many perceived

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1 Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

plaintiffs' lawyers as having more power over the prosecution of securities fraud cases than their clients, leading to the filing of frivolous cases that were beneficial to the lawyers but not to the plaintiff class members. Congress enacted the PSLRA to align lawyers' incentives with the interests of the clients they supposedly represented.[2] The PSLRA created a presumption that a court would name the class member with the largest financial interest in the outcome of the case as the lead plaintiff, rather than the first class member to file suit.[3] The lead plaintiff would then have full control over the litigation, including the selection and monitoring of class counsel.[4] With a guaranteed large financial interest in the case, the lead plaintiff's stakes would equal or exceed those of the class counsel, thereby properly placing the lawyer in the service of the client rather than the reverse.

In drafting the PSLRA, Congress had particular lead plaintiffs in mind: institutional investors (including hedge funds, public or private pension funds, and mutual funds),[5] who typically have more money at stake in securities fraud cases than any individual investor.[6] Congress hoped that institutional investors, because of both their larger financial interests and their sophistication and experience, would be able to hire and monitor class counsel with their own interests and the interests of the class as their first priority.[7]

However, not all institutional investors are the same; plaintiffs' lawyers may still be able to exert excessive power over certain clients. This Note explores a new way for plaintiffs' lawyers to co-opt securities class actions: by paying-to-play. "Paying-to-play" describes the practice of donors giving campaign contributions (or other favors)[8] to government officials in exchange for government contracts—a quid

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[2] *See* H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.) (noting that in passing PSLRA, "Congress has been prompted [in part] by . . . the manipulation by class action lawyers of the clients whom they purportedly represent"), *reprinted in* 1995 U.S.C.C.A.N. 730, 730.

[3] Private Securities Litigation Reform Act of 1995 § 101(a), 15 U.S.C. § 77z-1(a)(3)(B)(i), (iii) (2006).

[4] *Id.* § 77z-1(a)(3)(B)(v).

[5] S. Rep. No. 104-98, at 6 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 685; *cf.* H.R. Rep. No. 104-369, at 32 ("These provisions are intended to increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel.").

[6] *See* James D. Cox & Randall S. Thomas, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 Colum. L. Rev. 1587, 1623 n.139 (2006) (defining and giving examples of "institutional lead plaintiff[s]").

[7] *Id.* at 1588–89.

[8] "Paying-to-play" can also refer to any close, questionable relationship between law firms and pension funds, including "wining and dining" officials who choose class counsel. *See, e.g.*, John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice*,*"* 30 Cardozo L. Rev. 407, 415 (2008). In this Note,

pro quo. Because elected officials often help manage public institutional investment funds, some fear that plaintiffs' lawyers are making campaign contributions to the funds' leadership in order to gain favorable consideration by the funds for legal work.[9] By bribing the funds' decisionmakers with campaign contributions, plaintiffs' lawyers could regain their power over potential lead plaintiffs, creating anew the agency cost problem that the PSLRA attempted to solve.

Legal scholars, the media, courts, Congress, and state legislatures have raised paying-to-play fears and have proposed and enacted reforms.[10] Aside from a few anecdotal reports, however, no examination of actual campaign contributions from plaintiffs' lawyers to investment-fund officials exists in the legal literature. This Note provides the first empirical study of paying-to-play by reporting on campaign contributions from law firms to elected officials affiliated with the investment funds that selected the law firms as class counsel.[11]

Importantly, this Note does not attempt to determine the underlying reasons *why* investment funds select law firms as class counsel, or *why* law firms give campaign contributions to fund officials. Campaign contributions may be the sole driver of law firm selection (the paying-to-play theory), or merit-based factors, such as a firm's location or experience, may be the only considerations.[12] Instead, this Note returns to the first stage of the analysis, which many commentators have skipped, and examines whether law firms are contributing to investment funds' leadership at all. If law firms are not contributing, there can be no rational fear of paying-to-play. If firms are contributing, then further research is needed to determine the contributions' effects on law firm selection and, if the effects are substantial and negative, the appropriate means of reform to stop the practice.

I use the term to refer to making political contributions in exchange for class counsel appointment.

[9] In some states, law firms themselves can donate to political officials; in others, a law firm would pay-to-play through lawyers' contributions in their own names. For simplicity's sake, I refer to contributions from "law firms" or "lawyers" interchangeably.

[10] *See infra* Part II.C (discussing reforms to stop paying-to-play).

[11] The other empirical pieces on the subject do not examine campaign contributions. *See infra* notes 85–93 and accompanying text (summarizing previous empirical studies of paying-to-play).

[12] A future statistical study may shed more light on the questions of why firms contribute and if those contributions have negative effects on law firm selection and litigation behavior. See Part III.D, *infra*, for factors that researchers could consider in attempting to discover to what extent contributions affect pension funds' involvement in securities class actions. This Note seeks instead to answer baseline questions about lawyers' campaign contributions and to serve as a starting point for future research on the paying-to-play practice.

Determining whether law firms are contributing to investment fund officials, and thus whether paying-to-play fears are justified, is important for at least two reasons. First, Congress, state legislatures, the American Bar Association (ABA), and courts have considered or adopted reforms to prevent paying-to-play.[13] These reforms have costs, including restricting political participation by lawyers and changing the management structure and reducing the public accountability of pension funds. These reforms could either be unnecessary and too costly if paying-to-play is not occurring or could be insufficient if paying-to-play indeed "is the new rule of the game."[14] Second, as Stephen Choi has pointed out, courts trust the PSLRA's lead plaintiff provision to eliminate agency costs and therefore use a low standard of review in examining attorney fees in securities class actions.[15] But if lawyers have found a way to regain control of cases and thus have renewed the agency cost problem, courts should scrutinize attorney-fee agreements and decisions by lawyers on behalf of their class clients more closely.

Using a dataset of all securities fraud class actions filed from 2002 to 2006, a list of the membership of pension fund boards, and data compiled from state-level campaign finance filings, this Note presents the first comprehensive report on campaign contributions from law firms to political officials affiliated with investment-fund lead plaintiffs. This Note finds that law firms indeed contribute to the investment funds that select them as class counsel, thus ruling out one possible response to allegations of a paying-to-play problem, namely, that these contributions are not being made in the first place.

Part I of this Note discusses the agency cost problem that the PSLRA attempted to fix and outlines the PSLRA's focus on institutional investors through its lead plaintiff provision. Part II notes the resulting paying-to-play fears and briefly summarizes the reforms that policymakers have proposed and enacted. Part III presents the campaign contribution study, including a description of the data and methodology, its findings, and an explanation of the impact of the results on the paying-to-play theory. It then provides a guide to future researchers for examining the remaining paying-to-play questions, including why lawyers and law firms contribute to investment fund

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13 *See infra* Part II.C (discussing reforms to stop paying-to-play).

14 Samantha M. Cohen, Note, *"Paying-To-Play" Is the New Rule of the Game: A Practical Implication of the Private Securities Litigation Reform Act of 1995*, 1999 U. ILL. L. REV. 1331, 1334 (1999).

15 Stephen J. Choi, *Motions for Lead Plaintiffs in Securities Class Actions* 3 (N.Y. Univ. Law and Econ., Research Paper No. 08-53, 2009), *available at* http://ssrn.com/abstract=1293926.

officials and whether these contributions have any effect on class counsel selection and investment fund behavior in securities class actions.

I
The PSLRA and Paying-To-Play

Congress intended the PSLRA to reduce agency costs between plaintiffs' lawyers and their class-member clients by promoting institutional investors as lead plaintiffs. Because lawyers already enjoyed a large financial benefit from serving as class counsel in securities class actions, Congress wanted to ensure that lead plaintiffs would also have strong financial interests in the outcome of their cases. At first glance, the PSLRA appears to have been successful in aligning the interests of class counsel with those of their clients.

A. The Pre-PSLRA Environment

Prior to the enactment of the PSLRA in 1995, courts often named the first plaintiff to file a complaint as the class representative in securities fraud class actions.[16] The class representative would then choose the class counsel, a position that is "quite lucrative" for the chosen firm.[17] The class counsel's fee award is often a percentage of the total class settlement fund, with the historical average being around 32%.[18] In contrast to the substantial fees firms earn serving as class counsel, individual plaintiffs often received only small recoveries if the class was victorious,[19] largely because individual stock investments are "wide[ly] dispers[ed]."[20] For example, in *In re Infospace*, the individual investors were set to recover about .01% of their losses from falling share prices (or about 14 cents for each share of stock that lost $133 in value), while the class counsel sought an $8.5 million fee award.[21]

Because individuals' investments are dispersed, their interests in the outcome of securities fraud class actions were small relative to

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16 Cox & Thomas, *supra* note 6, at 1597–98.

17 *Id.* at 1598.

18 *Id.* at 1599.

19 *See, e.g.*, David Kidwell, *1995 Law Changed Landscape for Securities-Fraud Lawsuits*, Chi. Trib., June 22, 2006, at 17 (describing pre-PSLRA individual recoveries as pennies on dollar); *see also* S. Rep. No. 104-98, at 6 (1995) (noting that plaintiffs received on average 7 to 14 cents for every dollar lost), *reprinted in* 1995 U.S.C.C.A.N. 679, 685.

20 Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 Colum. L. Rev. 1489, 1492 (2006).

21 *In re* Infospace, Inc. Sec. Litig., 330 F. Supp. 2d 1203, 1205, 1211 (W.D. Wash. 2004). The court reduced the fee award to $4 million, slightly increasing the plaintiff investors' recovery. *Id.* at 1216.

class counsel's interests. As a result, the "greatest incentive to prosecute" securities fraud lay with law firms, not individual investors.[22] Because of this skewed incentive structure, plaintiffs' lawyers had "nearly total freedom from traditional forms of client monitoring"[23] when representing individual investors in securities class actions. Indeed, prior to the PSLRA, William Lerach—then one of the foremost plaintiffs' securities lawyers—said, "I have the greatest practice of law in the world. I have no clients."[24]

Even worse, some plaintiffs' lawyers turned the typical agent-client relationship fully on its head and hired "professional plaintiffs,"[25] who owned shares of various companies and waited for lawyers' instructions. With plaintiffs secured, law firms would then "race to the courthouse" in the hopes of installing their plaintiffs as class representatives and being named class counsel.[26] Law firms developed close relationships with potential class representatives, sometimes illegally paying kickbacks to encourage them to file suit and then subsequently name the contributing law firm as class counsel.[27] Law firms thus fully abdicated their role as representatives and instead became both agent and principal. Plaintiffs' lawyers made decisions, such as when to file suit and when to settle a case, in their own financial interests and not in the best interests of their clients.[28] Additionally, because each case offered a potential large financial award if it settled, firms sought to represent many clients with minimal effort, hoping that just one case would be successful and reap a large

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[22] Choi & Thompson, *supra* note 20, at 1492.

[23] Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 20 (1991).

[24] Neil Weinberg & Daniel Fisher, *The Class Action Industrial Complex*, Forbes, Sept. 20, 2004, at 153.

[25] Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053, 2059 n.28 (1995) (internal quotation marks omitted) (describing professional plaintiffs as owning "widely dispersed and thinly spread stock holdings").

[26] *Id.* at 2062. The firm would then repay the plaintiff through kickbacks or by allocating a disproportionately large share of the settlement to the lead plaintiff, leaving little for the other members of the class. *See* Russell Kamerman, Note, *Securities Class Action Abuse: Protecting Small Plaintiffs' Big Money*, 29 Cardozo L. Rev. 853, 853 (2007). In 2008, Melvyn Weiss and William Lerach were sentenced to jail and ordered to forfeit millions of dollars after pleading guilty to making payments to lead plaintiffs in securities class action to ensure, as prosecutors called it, a "'stable' of ready clients." Jonathan D. Glater, *Class-Action Lawyer Given a 30-Month Prison Term for Hiding Kickbacks*, N.Y. Times, June 3, 2008, at C3.

[27] *See* Brian Grow, *The Kings of Class Actions*, Bus. Wk., May 16, 2005, at 52; Weinberg & Fisher, *supra* note 24, at 152.

[28] S. Rep. No. 104-98, at 6 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 685.

payout.[29] One winning case could pay for many losers. Firms played this class action roulette with their clients' cases instead of working for the particular result that each client desired. These misaligned incentives between attorneys and their clients led to an increase in the filing of frivolous lawsuits and ultimately drove Congress to pass the PSLRA.[30]

B. The PSLRA and Its Lead Plaintiff Provision

In response to this perceived abuse of securities class actions, Congress enacted the PSLRA in 1995,[31] hoping to "empower investors so that they, not their lawyers, control securities litigation."[32] The importance of the plaintiff class controlling the lawsuit has been long recognized by courts in applying Federal Rule of Civil Procedure 23's adequacy of representation requirement in the context of nonsecurities class actions. In class actions proceeding under Rule 23, courts place the burden on plaintiffs to show that they can "direct and control the litigation" before they can be named representative for the class.[33]

The PSLRA echoes Rule 23's concern with ensuring plaintiff class control over the litigation. The PSLRA, adopting a reform suggested in an influential article by Elliot Weiss and John Beckerman,[34] establishes a rebuttable "presumption that the most adequate [lead] plaintiff . . . is the person or group of persons that . . . has the largest financial interest in the relief sought by the class."[35] Congress's theory was that the plaintiff with the largest financial interest would

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29 *See* Choi & Thompson, *supra* note 20, at 1491 ("[A] small group of plaintiffs' attorneys filed most of these cases . . . [and] they earned very substantial fees when they were successful in court or struck a settlement, and . . . they frequently jockeyed for position as 'general' counsel, all of which led to the filing of many duplicative, substantially identical, complaints."); *see also* Cox & Thomas, *supra* note 6, at 1593 (describing class attorneys' practice of maintaining portfolio of class suits to spread risk of failing as well as their weak incentives to pursue meritorious claims aggressively).

30 H.R. Rep. No. 104-369, at 32 (1995) (Conf. Rep.) (describing legislation as necessary to prevent frivolous lawsuits), *reprinted in* 1995 U.S.C.C.A.N. 730, 731.

31 S. Rep. No. 104-98, at 4; 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1806 (3d ed. 2005).

32 S. Rep. No. 104-98, at 6; *see also* H.R. Rep. No. 104-369, at 32 (describing goal of giving control of litigation to lead plaintiffs).

33 Berger v. Compaq Computer Corp., 257 F.3d 475, 481, 484 (5th Cir. 2001) ("[T]he adequacy standard must reflect . . . Congress's emphatic command that competent plaintiffs, rather than lawyers, direct such cases.").

34 *See* Weiss & Beckerman, *supra* note 25, at 2056 (arguing that institutional investors, given their large stakes in securities class actions, may be well situated to monitor class counsel).

35 Private Securities Litigation Reform Act of 1995 § 101(a), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I) (2006).

have the greatest incentive to manage the case competently and achieve the highest possible settlement. As one representative of institutional investors noted in testimony before Congress, "As the largest shareholders in most companies, we are the ones who have the most to gain from meritorious securities litigation."[36] The plaintiff with the largest financial interest is also likely to be sophisticated and have experience in securities litigation, enabling it to make better litigation decisions than other potential lead plaintiffs.[37]

The PSLRA also guarantees the most adequate plaintiff—the plaintiff with the largest financial interest—the power to "select and retain counsel to represent the class."[38] Congress's intention in allowing a sophisticated, self-interested plaintiff to hire counsel was "to permit the plaintiff to choose counsel rather than have counsel choose the plaintiff."[39] A properly self-interested lead plaintiff would hire the best lawyers for the class and ensure that the lawyers made decisions in the plaintiffs' interest rather than their own.[40] In theory, if the plaintiff with the largest financial interest in the suit is the lead plaintiff, a law firm would no longer have an incentive to bully smaller investors into filing frivolous lawsuits that are not in their financial interest, as those investors would no longer be named lead plaintiff nor be able to select class counsel. Therefore, the lawyer-client agency cost problems present before the PSLRA would be reduced or eliminated.

C. *Institutional Investors as Lead Plaintiffs*

The legislative history of the PSLRA reveals that Congress explicitly targeted institutional investors to be these new lead plaintiffs in securities class actions.[41] The Senate Banking Committee, which had jurisdiction over the PSLRA, stated in its committee report that the "[c]ommittee intends to increase the likelihood that institutional investors will serve as lead plaintiffs . . . ."[42] The committee argued that, because of their relatively large financial interests in the successful prosecution of the case, "increasing the role of institutional

36 S. Rep. No. 104-98, at 11 (quoting testimony of Maryellen Andersen, then-Treasurer of the Council for Institutional Investors).

37 *Id.*

38 § 78u-4(a)(3)(B)(v).

39 S. Rep. No. 104-98, at 11.

40 Kamerman, *supra* note 26, at 862 n.57.

41 *See, e.g.*, S. Rep. No. 104-98, at 6 (noting that PSLRA's lead plaintiff provision will "thereby increas[e] the role of institutional investors in securities class actions").

42 *Id.* at 11.

investors in class actions will ultimately benefit the class and assist the courts."[43]

Initially, however, institutional investors did not comply with Congress's wishes. Indeed, only "small numbers"[44] of institutions served as lead plaintiffs in the years immediately following the PSLRA's passage. From 1997 to 2000, somewhere between ten and twenty institutional investors were named lead plaintiffs each year;[45] however, the number grew to thirty-one in 2001 and then to fifty-six institutions in 2002.[46] Today, institutional investors frequently file to be lead plaintiffs in securities class actions. In the period covered in this study, 2002 to 2006, an institutional investor filed to be lead plaintiff in at least 41% of the total cases, for a total of at least 445 institutional investors.[47] Almost all of the institutional investors serving as lead plaintiffs today are state or municipal pension funds or labor union pension funds. In fact, most private institutional investors, such as mutual funds, "won't touch" the PSLRA's lead plaintiff provision.[48] Public and union pension funds, then, are left to carry out Congress's charge to solve the agency cost problems in securities class actions.

At first, it seemed that the increase in institutional investors serving as lead plaintiffs had its intended effect. After the PSLRA's passage, the Court of Appeals for the Third Circuit concluded that "[t]he PSLRA has shifted the balance of power away from plaintiffs' attorneys . . . to the institutional plaintiffs who now supervise securities class actions."[49] Similarly, a district court named an institutional investor as lead plaintiff after recognizing institutions "as being ideally suited to control . . . securities class action litigation."[50]

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[43] *Id.*

[44] Choi & Thompson, *supra* note 20, at 1503; *see also* Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 Wash. U. L.Q. 869, 888 (2001) (providing data on frequency of institutional investors as lead plaintiffs).

[45] Choi & Thompson, *supra* note 20, at 1504.

[46] *Id.*

[47] *See* Memorandum from Drew T. Johnson-Skinner to the *New York University Law Review* (Oct. 24, 2009) (on file with the *New York University Law Review*) (reproducing RiskMetric Group's Securities Class Action Services data of all securities class actions filed from 2002 to 2006).

[48] *See* Choi & Thompson, *supra* note 20, at 1504 & n.99 (citing *Panel Discussion: The Private Securities Law Reform Act: Is It Working?*, 71 Fordham L. Rev. 2363, 2369 (2003) (statement of Edward Becker, C.J.)). This is likely because of the close relationship between private funds and the companies in which they invest.

[49] *In re* Cendant Corp. Sec. Litig., 404 F.3d 173, 193 (3d Cir. 2005).

[50] Glauser v. EVCI Career Colls. Holding Corp., 236 F.R.D. 184, 188 (S.D.N.Y. 2006).

Statistical evidence also supported courts' favorable impression of institutional investors.[51] A 2006 Cornerstone Research study showed that, even when controlling for other factors, institutional investor involvement in securities class actions led to higher overall settlement values.[52] As of 2007, all of the top ten settlement amounts in securities class action history were achieved by classes led by institutional investors.[53] Not only do institutional investors achieve higher settlement amounts, but it appears that they also negotiate lower attorney-fee percentages for the class, indicating reduced agency costs between lawyer and client. In a 2006 study, Michael Perino found that pension fund–led classes paid an average of 19.98% of the settlement amount to class counsel while non–pension fund classes paid 27.13%.[54] Stephen Choi has also found evidence indicating institutional investors' success at reducing agency costs. By examining the composition of lead plaintiffs and indicators of attorney-client agency costs, Choi found that institutional investors that frequently file to be lead plaintiffs develop a "repeat relationship with attorneys" and negotiate for lower attorneys' fees for the class.[55] The PSLRA, through its lead plaintiff provision, appears at first glance to have been successful at putting institutional investors in control of securities class actions and reducing attorney-client agency costs.

II
The Paying-To-Play Problem

The first fears over paying-to-play surfaced with prominent media reports in 1998.[56] The legal academy became concerned with paying-to-play shortly thereafter; articles published following the PSLRA's passage announced paying-to-play as a problem and proposed various

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[51] Jay W. Eisenhofer, *The Post-PSLRA Securities Litigation Landscape: The Effect of Institutional Investors as Lead Plaintiffs* (describing data indicating increased institutional involvement in securities class actions), *in* Class Action Litigation 2007: Prosecution & Defense Strategies 149, 152–53 (PLI Litig. & Admin. Practice, Course Handbook Series No. H-761, 2007).

[52] Laura E. Simmons & Ellen M. Ryan, Cornerstone Research, Securities Class Action Settlements: 2006 Review and Analysis 10 (2006), *available at* http://securities.cornerstone.com/pdfs/settlements_2006.pdf.

[53] *See* Eisenhofer, *supra* note 51, at 156–57. It should be noted that higher settlement amounts are not perfect indicators of increased lawyer performance because many factors, including the harm to the class, affect the amount of the settlement fund.

[54] *Id.* at 159 (citing Michael A. Perino, *Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions* (St. John's Univ. Sch. of Law Legal Studies Research Paper Series, Paper No. 06-0034, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870577).

[55] Choi, *supra* note 15, at 37.

[56] *See infra* notes 68–73 and accompanying text (describing media coverage of suspected paying-to-play in connection with WorldCom securities fraud litigation).

solutions.[57] Subsequent papers have continued to suggest reforms, but little attempt at an empirical study of the practice has been made.[58] This lack of evidence, however, has not stopped courts, the ABA, pension funds, Congress, and state legislatures from discussing and implementing proposals to limit the suspected practice.

A. Anecdotal Evidence of the Paying-To-Play Problem in the Media

Starting as early as 1998, three years after the PSLRA's passage, fears began to circulate that plaintiffs' lawyers had found a loophole in the PSLRA. In *In re Cendant Corp. Litigation*,[59] the two law firms selected as class counsel had given nearly $200,000 in campaign contributions to former New York State Comptroller Carl McCall, who was the sole trustee of a public pension fund that served as lead plaintiff.[60] On appeal, the Third Circuit upheld the district court's ruling that it should not overturn, based on campaign contributions alone, the PSLRA's presumption that the New York pension fund was the most adequate plaintiff. The Third Circuit noted that

> actual *proof* of pay-to-play would constitute strong (and, quite probably, dispositive) evidence that the presumption had been rebutted. A movant that was willing to base its choice of class counsel on political contributions instead of professional considerations would, it seems to us, have quite clearly demonstrated that it would "not fairly and adequately protect the interests of the class."[61]

The Third Circuit, however, rejected the claim that the fund should not serve as lead plaintiff because the district court found no evidence that "the contributions, themselves legal, had influenced the [pension fund's] selection process."[62] Instead, the district court found the allegations of paying-to-play to be "[s]peculative" and "unimpressive."[63]

Regardless of these findings, the media paid ample attention to the paying-to-play claims in *Cendant*.[64] For example, the *New York Times* reported that

> with the number of securities class-action cases up sharply this year, some people think there is something very wrong here, something

[57] *See infra* Part II.B (summarizing academic treatment of paying-to-play to date).

[58] *Id.*

[59] 182 F.R.D. 144 (D.N.J. 1998).

[60] *Id.* at 148–49; Shaila K. Dewan, *Donors to McCall Profit in Cases State Pursues Against Corporate Wrongdoers*, N.Y. Times, Aug. 14, 2002, at B4.

[61] *In re* Cendant Corp. Litig., 264 F.3d 201, 269 (3d Cir. 2001).

[62] *Id.*

[63] *Cendant*, 182 F.R.D. at 149.

[64] *See, e.g.*, Dewan, *supra* note 60, at B4 (describing controversy in *Cendant*); Diana B. Henriques, *Conflict over Conflicts: Class-Action Lawyers Defend Their Political Contribu-*

> that runs counter to the goals Congress had in 1995 when it enacted a law giving pension funds and other institutional investors an enhanced role in class-action litigation.[65]

The *Times* interviewed pension fund officials, who reported no change in their negotiating power with law firms post-PSLRA.[66] In discussing selecting counsel for securities cases, one fund official said, "We don't choose them; they choose us."[67]

Also, from 1998 to 2004, the media highlighted contributions from New York lawyer Max Berger to McCall in connection with a securities fraud lawsuit against WorldCom, Inc. McCall, who was the sole director of the New York pension fund that was lead plaintiff in the case, chose Berger's law firm, Bernstein Litowitz Berger & Grossman (BLBG), as the fund's counsel.[68] When codefendant Citigroup settled in 2004 for $2.58 billion,[69] Berger's firm stood to receive part of a $144 million fee award.[70] Newspaper headlines that followed included *Firms That Got Fat Legal Jobs Give to McCall* and *List of Donors May Be Issue for McCall*.[71] In an article entitled *The Class Action Industrial Complex*, *Forbes* magazine pointed to the Berger-McCall relationship and declared that securities fraud class actions in general were "fed by a cozy cabal of lawyers . . . and public pension funds."[72] When asked about his contributions, Berger confirmed the pay-to-play theorists' worst fears and admitted that he donated to "get[ ] a foot in the door"[73] with McCall and the lucrative pension fund he ran.

Even more recently, the media has found more cases of suspected paying-to-play. For example, former Illinois Governor Rod Blagojevich[74] and former Wisconsin Attorney General Peg

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tions, N.Y. TIMES, July 30, 1998, at D1 (same); Kevin McCoy, *Campaign Contributions or Conflicts of Interest?*, USA TODAY, Sept. 11, 2001, at B1 (same).

65 Henriques, *supra* note 64, at D1.

66 *Id.* at D7.

67 *Id.*

68 Grow, *supra* note 27, at 52. BLBG was hired along with two other firms: Milberg, Weiss, Bershad, Hynes & Lerach and Barrack, Rodos & Bacine. Lawyers from all three firms donated to McCall. Clifford J. Levy, *Firms That Got Fat Legal Jobs Give to McCall*, N.Y. TIMES, July 29, 1998, at A1.

69 Julie Creswell, *Citigroup Agrees To Pay $2 Billion in Enron Scandal*, N.Y. TIMES, June 11, 2005, at A1. An article in *Forbes* magazine reported the amount to be $2.65 billion. Weinberg & Fisher, *supra* note 24, at 152.

70 Weinberg & Fisher, *supra* note 24, at 152.

71 Levy, *supra* note 68, at A1; James C. McKinley, Jr., *List of Donors May Be Issue for McCall*, N.Y. TIMES, Mar. 18, 2002, at B1.

72 Weinberg & Fisher, *supra* note 24, at 150.

73 Grow, *supra* note 27, at 52.

74 Carol Marin, Editorial, *State of Scandal: Illinois Govs Seem All Interlocked*, CHI. SUN-TIMES, Aug. 22, 2007, at 39.

Lautenschlager[75] both came under fire in the press and from their political opponents for accepting contributions from lawyers in exchange for handing out government legal business.

B. Paying-To-Play Concerns in the Legal Literature

Paying-to-play concerns in securities fraud class actions have received brief mention in several scholarly articles but have been discussed thoroughly in only a few papers. My research revealed only two attempts at empirical studies of the practice, although both studies used indirect measures of paying-to-play, rather than examining lawyers' campaign contributions.[76]

As an example of scholarly treatment of paying-to-play, Samantha Cohen predicted in 1999 (before institutions began serving as lead plaintiffs in large numbers) that paying-to-play would become the "new rule of the game" in securities class actions.[77] Cohen offered as evidence the *Cendant* litigation, reports of paying-to-play by bond dealers in competing for municipal underwriting work,[78] a newspaper report suggesting that lawyers had been making increased contributions to elected officials who ran pension funds since the passage of the PSLRA, and concerns about this practice voiced by the Securities and Exchange Commission (SEC) and the ABA.[79] Cohen highlighted the agency cost concerns presented by paying-to-play by noting that it not only harms the investors and taxpayers whose money is in the client funds but also the other plaintiffs' lawyers who are shut out of work because they did not make political contributions.[80] Cohen also discussed proposals for reform and ultimately recommended that courts use a competitive bidding process to select class counsel instead of allowing the lead plaintiff to select the firm as dictated by the PSLRA.[81]

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[75] Stacy Forster & Patrick Marley, *Attorney General Again Cleared; Donation Acceptance Didn't Violate Rules, Ethics Board Says*, MILWAUKEE J. SENTINEL, Aug. 26, 2006, at B1.

[76] *See* Cox & Thomas, *supra* note 6, at 1613–14 & nn.108–13 (discussed at *infra* notes 85–89 and accompanying text); David H. Webber, *Is "Pay-To-Play" Driving Public Pension Fund Activism in Securities Class Actions? An Empirical Study* 2 (N.Y. Univ. Law and Econ. Research Paper Series, Working Paper No. 09-28, 2009), *available at* http://ssrn.com/abstract=1432497 (discussed at *infra* notes 92–93 and accompanying text).

[77] Cohen, *supra* note 14.

[78] *Id.* at 1333–35, 1342–43.

[79] *Id.* at 1341 & n.73, 1343.

[80] *Id.* at 1332.

[81] *Id.* at 1354; *see* Private Securities Litigation Reform Act of 1995 § 101(a), 15 U.S.C. § 78u-4(a)(3)(B)(v) (2006) ("The [lead] plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.").

In 2001, John C. Coffee, Jr. discussed paying-to-play, also by citing *Cendant*. He wrote that a "network of relationships exists between an increasingly national plaintiffs' bar and those state officials who have actual control over state and municipal pension funds."[82] Coffee cited a newspaper article that found New York and Philadelphia lawyers contributing to the campaigns of state treasurers in distant states.[83] He then suggested that paying-to-play "seem[ed] pervasive" and discussed possible reforms.[84]

In 2006, James D. Cox and Randall S. Thomas recognized that paying-to-play had been "difficult to verify empirically."[85] In their paper, they discussed paying-to-play by citing allegations of the practice in the media, including those in *Cendant*.[86] Cox and Thomas then attempted to find their own empirical evidence of paying-to-play. Instead of looking directly at political contributions by law firms, they examined instances of plaintiffs' law firms hiring state-level lobbyists. Cox and Thomas's theory was that the firms hired lobbyists to persuade state officials who ran public pension funds to file suit or select a particular firm as counsel.[87] Cox and Thomas had difficulty obtaining complete data but did find that three plaintiffs' law firms had disclosed hiring lobbyists in six states total.[88] Nevertheless, Cox and Thomas argued that to the extent that firms engage in hiring lobbyists, it "appears to be just part of a larger tapestry of 'pay-to-play' practices by law firms generally."[89]

In 2008, Charles Silver and Sam Dinkin proposed increasing the incentives, and thus competition, for individuals and institutions to serve as lead plaintiff, hoping that the increased incentives would outweigh any control law firms could exercise by paying-to-play.[90] In describing the state of paying-to-play today, Silver and Dinkin recognized that "the volume and frequency of class action lawyers' political contributions are unknown" and relied on anecdotal evidence from newspaper reports, as well as the strong push for regulation, to argue that "political contributions are widespread."[91]

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[82] John C. Coffee, Jr., *"When Smoke Gets in Your Eyes": Myth and Reality About the Synthesis of Private Counsel and Public Client*, 51 DePaul L. Rev. 241, 244 (2001).

[83] *Id.* (citing McCoy, *supra* note 64).

[84] *Id.*

[85] Cox & Thomas, *supra* note 6, at 1590–91.

[86] *Id.* at 1611–13.

[87] *Id.* at 1613 (relying on anecdotal reports from "several pension fund officials").

[88] *Id.* at 1613–14 & nn.108–13.

[89] *Id.* at 1614.

[90] Charles Silver & Sam Dinkin, *Incentivizing Institutional Investors To Serve as Lead Plaintiffs in Securities Fraud Class Actions*, 57 DePaul L. Rev. 471, 472–73 (2008).

[91] *Id.* at 484.

Most recently, in 2009, David H. Webber studied the membership of pension funds' boards and found that the percentage of politicians on the board of a fund that had filed at least one securities class action correlated negatively with the number of times that the fund had filed to be lead plaintiff.[92] Webber also found that the number of fund beneficiaries serving on the board correlated positively with the number of lead-plaintiff filings. Webber argued that these findings "suggest that the influence of 'pay-to-play' on public pension fund securities litigation activism has been overstated."[93] However, Webber did not investigate the selection of particular plaintiffs' law firms or examine political contributions from law firms to pension fund officials.

While the current literature on paying-to-play has helped shed light both on the ways in which plaintiffs' lawyers can circumvent the PSLRA and on the harms that could result to the class-action mechanism, there has yet to be an empirical study of campaign contributions from lawyers to elected officials affiliated with pension fund–lead plaintiffs.

C. *Reforms To Stop Paying-To-Play Today*

Paying-to-play fears based on anecdotal evidence and media reports have led to calls for reform by policymakers and legal scholars. In some cases, courts, pension funds, and legislatures have implemented real changes. These proposals may be necessary if paying-to-play is indeed "pervasive"[94] and if it has a negative impact on securities class actions. These reforms, however, are not without cost—they all sacrifice something in an attempt to close off pension fund officials from campaign contributions. Generally, there have been four different types of reforms proposed or enacted to combat the perceived paying-to-play problem.[95]

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92 Webber, *supra* note 76, at 2.

93 *Id.* Webber argued that paying-to-play had been overstated because one would expect the number of politicians on a fund's board and, thus, a fund's "political influence," to correlate positively with fund litigation activism. *Id.* at 19. However, it is not clear that a fund with ties to only one politician is any less likely to be susceptible to paying-to-play practices than a fund with ties to many politicians. On the contrary, law firms may find it easier to contribute to, and win the favor of, a fund solely controlled by one politician, or with only one politician on its board. Funds with many elected officials and, thus, competing interests, may be harder to "buy." Regardless, it is difficult to evaluate the presence of paying-to-play without reference to lawyers' campaign contributions.

94 *See supra* note 84 and accompanying text.

95 There have been other proposals in addition to those mentioned here, including increasing incentives for pension funds to act as lead counsel and providing for more judicial discretion in selecting counsel. For a thorough discussion of paying-to-play and broader PSLRA reform proposals, see generally Andrew S. Gold, *Experimenting with the*

1. *Disclosure to Courts*

The first proposal is that the fund attempting to be named lead plaintiff or, in some versions, the law firm attempting to be appointed lead counsel, should disclose to the court any campaign contributions from the selected law firm to any official "possessing direct oversight and authority over the fund."[96] If the law firm has made any contributions, then the court would have the power to decide whether to allow the plaintiff's selection to serve as class counsel and whether to allow the fund to continue as lead plaintiff.[97] In the version of this proposal put forward by the Third Circuit's Task Force on the Selection of Class Counsel, the burden would be on the institutional investor to disclose any contributions and, if any had been made, to make a "showing that the choice of counsel was not affected by any campaign contribution."[98]

The Securities Litigation Attorney Accountability and Transparency Act (SLAATA), first introduced in Congress in May 2006 and reintroduced in February 2008, would enact this proposal by requiring each plaintiff and attorney filing a securities class action to disclose any "direct or indirect payment" from the lawyer to the plaintiff.[99] The court would then determine whether the attorney was disqualified from representing the plaintiff.

Lead Plaintiff Selection Process in Securities Class Actions: A Suggestion for PSLRA Reform, 57 DePaul L. Rev. 447 (2008).

[96] *In re* Cendant Corp. Litig., 264 F.3d 201, 270 n.49 (3d Cir. 2001) (suggesting that district courts could properly require such disclosure); *see also* Luigi Zingales et al., Interim Report of the Committee on Capital Markets Regulation 83–84 (2006), *available at* http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf (recommending that SEC petition courts as amicus to require disclosure of political contributions made by counsel to lead plaintiffs prior to court's selection of either lead plaintiff or lead counsel).

[97] *See Cendant*, 264 F.3d at 270 n.49. ("If any such contributions have been made, the court could also require that the fund submit a sworn declaration describing the process by which it selected counsel and attesting to the degree to which the selection process was or was not influenced by any elected officials."); *see also In re* Cavanaugh, 306 F.3d 726, 732–33 (9th Cir. 2002) (noting such information would be relevant to court where it cast "genuine and serious doubt" on plaintiff's "willingness or ability to perform the functions of lead plaintiff").

[98] *Third Circuit Task Force Report on Selection of Class Counsel,* 74 Temp. L. Rev. 689, 765 (2001). Then–Chief Judge Edward Becker formed the Third Circuit's Task Force to evaluate the "class action landscape" after both the passage of the PSLRA and the innovation of judicial auctions to select class counsel. *Id.* at 689–90. The Report primarily relied on the *Cendant* case and testimony from securities plaintiffs' lawyers representing institutional investors, who said that paying-to-play "might be a concern." *Id.* at 755. It noted that "the possibility of collusion between institutional investors and chosen counsel remains of concern" despite other proposed reforms. *Id.* at 756.

[99] H.R. 5491, 109th Cong. § 3(a) (2006).

2. *Campaign Contribution Limits*

The second proposal is simply a stricter version of the first—to bar a law firm or lawyer who makes a campaign contribution to an elected official connected with a public pension fund from receiving legal work from the fund for the next two years or longer.[100] The ABA and the SEC led a movement to implement this reform by amending the rules governing lawyers' ethics.

In 1997, Arthur Levitt, then-chairman of the SEC, noted that only 25% of the public thought that lawyers were "honest and ethical" and said that "[p]ay-to-play presents just about as clear an ethical choice as the legal community is ever going to get."[101] Levitt and Harvey Goldschmid, then–general counsel of the SEC, encouraged the ABA to change its rules of professional conduct to prevent the practice more effectively. Goldschmid told the *New York Times* that "[i]f we allow wild political contributions to be made to get public benefits, . . . we're going to create questions about the integrity of the people and the integrity of the process."[102] Goldschmid was also part of an ABA task force that recommended new limits on political contributions from lawyers.[103] In February 2000, partly in response to these paying-to-play concerns, the ABA amended Model Rule of Professional Conduct 7.6 to prohibit lawyers from accepting "a government legal engagement" if they made political contributions for the purpose of being considered for legal work.[104]

These first two proposals have costs, however, as they would limit lawyers' participation in the political process. Certainly under the second, automatic-removal proposal, lawyers currently representing institutional investors (or those who might, either individually or as part of a firm) would be wary of contributing to pension fund officials. This worry would also exist under the first, mere-disclosure proposal, because it would be uncertain what level of political contributions would trigger a court's removal of a lead plaintiff or law firm from a case. Lawyers would in effect be forced to trade participation in the

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[100] This was proposed by the New York City Bar Association and was modeled on Rule G-37 of the Municipal Securities Rulemaking Board, which governs securities firms in municipal bond markets. Michael Higgins, *Pondering "Pay To Play": ABA Scrutinizes Link Between Campaign Contributions and Legal Work*, 83 A.B.A. J. 96, 96 (Nov. 1997); *see also* ZINGALES ET AL., *supra* note 96. Rule G-37 similarly bans a securities broker from engaging in a business transaction with a securities issuer if the broker made a political contribution to the issuer within the prior two years. Mun. Sec. Rulemaking Bd. Rule G-37(b)(i) (2005), *available at* http://www.msrb.org/msrb1/rules/ruleg37.htm.

[101] Cohen, *supra* note 14, at 1334.

[102] Henriques, *supra* note 64, at D1, D7.

[103] *Id.* at D7.

[104] MODEL RULES OF PROF'L CONDUCT R. 7.6 & annot. (2003).

political process for the ability to compete for lucrative legal work.[105] Even contributions to elected officials in lawyers' own states, whom lawyers would vote for, would presumably raise a court's suspicion.[106]

In addition, while the question of whether a disclosure or campaign contribution limitation would amount to a violation of the First Amendment's freedom of speech protections is beyond the scope of this Note, it must be noted that limitations on individuals' contributions to political campaigns garner the highest level of protection under the First Amendment.[107] Even if the proposals are constitutional, it is important to acknowledge that these reforms would impose limitations and uncertainty on a lawyer's freedom of speech and participation in the political process.[108]

The costs associated with these proposals may or may not be offset by the benefits, depending on the extent of the paying-to-play practice and its effects. These are questions this Note begins to answer in Part III.

3. *Restructuring Pension Fund Management*

Third, reformers have suggested that the structure of state pension funds should be changed, so that a "non-partisan board of trustees" either completely substitutes for the political officials who run the funds, or alternatively, is entrusted with the power to make litigation decisions, including whom and when the funds sue and which lawyers they hire. The Florida State Pension Fund Retirement System has adopted this suggestion by vesting the power to make liti-

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105 For a discussion of difficulties in enforcing this rule and other problems, see Alberto Bernabe, *Coming Soon to a Law Practice Near You: The New (and Improved?) Illinois Rules of Professional Conduct*, 39 LOY. U. CHI. L.J. 691, 739–40 (2008).

106 *See infra* Part III.D.1.

107 *See* Buckley v. Valeo, 424 U.S. 1, 19–23, 29 (1976) (holding limitation on individuals' campaign contributions valid even though strict scrutiny applied). It seems that a rule for securities litigation modeled on the bond market's Rule G-37 would not violate the free speech protections of the First Amendment, as the Court of Appeals for the District of Columbia Circuit has held Rule G-37 to be constitutional. *See* Blount v. SEC, 61 F.3d 938, 944–47 (D.C. Cir. 1995) (holding Rule G-37's limitations on campaign contributions constitutional under strict scrutiny review). However, John Coffee rightly points out that the *Blount* case was decided before the Supreme Court's more recent cases striking down campaign contribution and expenditure limits as unconstitutional. John C. Coffee, Jr., *"Pay-To-Play" Reform: What, How and Why?*, N.Y. L.J., May 21, 2009, at 5, 7 (citing Randall v. Sorrell, 548 U.S. 230 (2006) (holding limits on campaign contributions by individuals and expenditures by candidates to be unconstitutional) and FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) (holding limits on independent expenditures by corporations to be unconstitutional)).

108 In *Buckley v. Valeo*, the Supreme Court held that a campaign contribution is a "symbolic act" that "serves as a general expression of support for the candidate and his views . . . ." 424 U.S. 1, 21 (1976) (per curiam).

gation decisions in a non-partisan board.[109] The State of Wisconsin has adopted a similar reform.[110]

This proposal, too, has costs. Presumably, state pension funds commonly have elected officials serving either directly on their boards or appointing other members of their boards, which allows for state government control of the funds. This direct connection to elected officials provides for democratic accountability with regard to the funds' successes and failures, including their litigation decisions. If paying-to-play is pervasive, removing elected officials from management roles might be necessary, but it will come at the cost of reducing government accountability. As John Coffee has noted, this kind of reform would result in a "far more anti-democratic" system of pension-fund governance.[111]

4. *Class Counsel Selected by Court-Run Auction*

Finally, the fourth proposal is that an auction run by the court should select class counsel, rather than the lead plaintiff.[112] The SLAATA, discussed above, would allow the court to "employ alternative means in the selection and retention of counsel . . . including a competitive bidding process," such as an auction.[113] In selecting counsel through an auction, the court would request bids from several law firms, asking them to indicate their qualifications to represent the class and their proposed attorneys' fees. Under this proposal, the court would typically select the most adequate firm that offered the class the best deal with respect to attorneys' fees. Judge Vaughn Walker pioneered a court-run auction to select the class representative in *In re Oracle Securities Litigation*, a pre-PSLRA case.[114] Since then, and continuing beyond the passage of the PSLRA, some courts around the country have used variations on an auction to replicate the

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[109] Coffee, Jr., *supra* note 82, at 244–45. The *Wall Street Journal* recently noted that the Mississippi Senate passed a bill that both required the state's attorney general to conduct competitive bidding for legal contracts and instituted a review board to examine state contracts. Editorial, *Lawsuit Inc.*, WALL ST. J., Feb. 25, 2008, at A14.

[110] *See* Henriques, *supra* note 64, at D7 (describing Wisconsin's counsel-selection process).

[111] Coffee, Jr., *supra* note 82, at 245.

[112] *Id.* at 244; *see also* Jill E. Fisch, *Aggregation, Auctions, and Other Developments in the Selection of Lead Counsel Under the PSLRA*, 64 LAW & CONTEMP. PROBS. 53, 80 (2001) (explaining that bidding firms submit fee structure proposals to courts, which then select lead counsel and attorneys' fees).

[113] *See* H.R. 5491, 109th Cong. § 4(b) (2006) ("In exercising the discretion of the court over the approval of lead counsel, the court may employ alternative means in the selection and retention of counsel for the most adequate plaintiff, including a competitive bidding process.").

[114] *In re* Oracle Sec. Litig., 136 F.R.D. 639 (N.D. Cal. 1991).

market's selection of law firms within a court's chambers;[115] however, most courts, especially more recently, have disfavored this practice.[116]

As other commentators have noted, a court-run auction to determine class counsel in a securities fraud class action "is inconsistent with the language of the PSLRA."[117] The PSLRA, both in its text and intent, instructs the court to appoint the "most adequate *plaintiff*,"[118] not the most adequate law firm, and then provides that "most adequate plaintiff" with its choice of lead counsel.[119] The court's only power under the PSLRA is to veto the plaintiff's selection, not to dictate whom the plaintiff must choose.[120] By replacing the lead plaintiff's selection of counsel with the court's, a court implementing this proposal would undermine the PSLRA's intent to empower the *lead plaintiff* to select and monitor class counsel. This would have the same effect as paying-to-play: The lead plaintiff would be disempowered from actually controlling the class action. This proposal would also defeat Congress's explicit intent to target sophisticated institutional investors, who have experience with securities investment, and thus ostensibly are more able to control securities litigation decisions.

Even outside of the PSLRA context, court-run auctions are a controversial device, and others have thoroughly pointed out their costs and benefits.[121] Briefly, one concern is that courts are institutionally ill-equipped to replicate market selection. They will often not know if a fair, optimally efficient price has been reached through the auction.[122] The court may overestimate the amount of work the plaintiff's lawyer will have to put into the case and the class may overpay in fees. Conversely, simply selecting the firm offering the lowest attorneys' fees will not work—if the fees turn out to be too low to make the case worthwhile for the law firm, the firm will have an incentive to cut its losses and settle quickly, likely at a price below what the plain-

115 *See, e.g.*, *In re* Bank One S'holders Class Actions, 96 F. Supp. 2d 780, 784–90 (N.D. Ill. 2000); *In re* Cendant Corp. Litig., 182 F.R.D. 144, 150–52 (D.N.J. 1998); Rafferty v. Mercury Fin. Co., No. 97 C 624, 1997 WL 529553, at *3 (N.D. Ill. 1997).

116 *See In re* Cavanaugh, 306 F.3d 726, 734 & n.14 (9th Cir. 2002) (noting that auction would interfere with authority of lead plaintiff); *In re* Cendant Corp. Litig., 264 F.3d 201, 273–77 (3d Cir. 2001) (holding that auction is inappropriate in most PSLRA cases); *In re* Microstrategy, Inc. Sec. Litig., 172 F. Supp. 2d 778, 786 n.21 (E.D. Va. 2001) (rejecting auction because plaintiff, not court, should select counsel).

117 *See* Fisch, *supra* note 112, at 91.

118 Private Securities Litigation Reform Act of 1995 § 101(a), 15 U.S.C. § 77z-1(a)(3)(B)(i) (2006) (emphasis added).

119 *Id.* § 77z-1(a)(3)(B)(v); Fisch, *supra* note 112, at 91.

120 § 77z-1(a)(3)(B)(v); Fisch, *supra* note 112, at 91.

121 *See, e.g.*, Fisch, *supra* note 112, at 83, 94.

122 *Id.* at 94.

tiffs should otherwise receive.[123] Finally, the lowest bidder might not provide the best or even adequate representation.[124] In sum, replacing the PSLRA's current framework with a court-run auction carries both statutory and functional concerns that should not be ignored.

Part II of this Note discussed the rise of paying-to-play fears prompted largely by high-profile anecdotal evidence in the media and the corresponding lack of empirical evidence of campaign contributions from law firms to pension funds in the legal literature. Part II also discussed possible proposals for reform and their likely costs. This Note argues that because these reforms are not costless, a comprehensive understanding of paying-to-play theory is necessary before we implement reforms. Part III begins that study by reporting on the first necessary element of the paying-to-play theory: campaign contributions from law firms to the pension funds that selected them as counsel.

III
Study

Anecdotal evidence and statements from the media, courts, and legal institutions reflect significant concern over paying-to-play. The core of the paying-to-play theory is that campaign contributions improperly influence lead plaintiffs' litigation decisions and upset the balance of power that the PSLRA tried to restore. A fundamental assumption that has so far gone untested, however, is that law firms are, in fact, giving significant political contributions to pension fund officials. In this Part, I examine whether law firms make campaign contributions at all to the pension funds that select them as counsel.

A. Data and Methodology

The data in Part III of this Note covers all federal securities class actions filed in the United States from 2002 to 2006. The case dataset, including the case name, the filing date, the filing plaintiffs, and the law firms involved, was provided to me by Securities Class Action Services, a division of RiskMetrics Group. I selected this time period because, prior to 2002, institutional investors had not begun to serve

[123] Another problem often raised in connection with auctions is that they remove the incentive for a firm to be the first-filer and thus to be the firm that finds and documents illegal activity. In the PSLRA context, however, the first-filer's benefit has already been removed and replaced with a presumption that the plaintiff with the largest financial interest will be lead plaintiff, so this concern is not present here.

[124] Fisch, *supra* note 112, at 83.

as lead plaintiffs under the PSLRA in large numbers,[125] and after 2006, complete information on the lead plaintiff and selected class counsel would not be available for all cases in the dataset. The selected time period also allows an examination of political contributions made by law firms to pension fund officials both before and after the law firm is selected.[126]

Of the 1076 securities class actions in the dataset, I identified the 445 cases where at least one institutional investor filed to be lead plaintiff. Finally, I narrowed my dataset to the seventy-four cases where the filing lead plaintiff was an institutional investor with at least one state-level elected official, or a person appointed by a state-level elected official, on its controlling board.[127] My narrowed case dataset, then, includes all of the cases filed from 2002 to 2006 where state-level paying-to-play would be possible.[128]

After narrowing my dataset, I identified the membership of the controlling boards of the plaintiff institutional investors at the time the case was filed.[129] For fund board positions that were ex officio, I determined who held the relevant elected office at the time of the filing of the complaint in the case.[130] For fund positions that were

[125] *See supra* notes 44–46 and accompanying text.

[126] While at first glance, one might expect that paying-to-play contributions would be given to pension fund officials before the law firm is selected, firms could equally pay-to-play by promising that contributions would be made after the firm is selected or even after resolution of the case. This would allow firms to avoid disqualification by judges who check to see whether firms have made relevant political contributions when appointing the lead plaintiff. *See infra* text accompanying notes 136–37 (describing why contributions need not be given prior to lead-counsel selection). Thus an additional benefit of the 2006 end-date included is that it allows contributions to be examined in the "after" period for all cases in the dataset.

[127] I used the institutions' websites to determine the composition of their boards. In a few cases, I communicated with the funds' staff if the relevant information was not available online. I was able to determine the board membership of all of the funds in my dataset. I did not include non-state-level elected officials because these officials typically do not report campaign finance information to a state agency.

[128] Because my dataset includes the entire universe of securities fraud class action cases where state-level paying-to-play would be possible, I am confident in drawing several preliminary conclusions from that evidence regarding contributions that could form the basis of paying-to-play. However, I endeavor to draw only those conclusions that my data directly suggest; I do not contemplate any larger statistical conclusions or extrapolations. The reader is encouraged to evaluate the significance of that data as he sees fit.

[129] Although each fund may have decided to file suit before the filing date and may have selected its counsel before or after that time, this date was used as the best estimate to determine the members of the board that selected a particular law firm to serve as class counsel. Unless the time of filing is close to an election or inauguration of a member of the board, there should be little error.

[130] In a few cases, especially for state legislators, this information was not available online, and I contacted elected officials or the funds to determine who was in office at the time of filing.

appointed by an elected official, I also determined what elected official was in office at the time of the filing of the complaint in the case.[131] It should be noted that some members of pension fund boards are not themselves, nor are they appointed by, elected officials; they often hold office as a result of selection or appointment by some private group, such as a state college employees association.[132] These are non–politically affiliated board members who would not be susceptible to paying-to-play.

Next, I identified the law firms that the funds selected as counsel in each case in my dataset.[133] In some instances, my dataset listed more than one plaintiff law firm per case filed, especially in cases where more than one institution was listed as a filing lead plaintiff. For purposes of matching firms with the pension fund officials to whom they may have contributed, I assumed that all funds and all counsel listed for a particular case in my dataset were affiliated. While possibly overinclusive, this assumption is probably not far from reality. Law firms and funds often strategically group together and choose among themselves a lead plaintiff, and thus lead counsel, to promote to the court in an effort to ensure that a member of their group is selected as lead plaintiff.[134] The other lead plaintiffs and their counsel will then withdraw once they reach an agreement as to the lead plaintiff and lead counsel to be offered to the court, often giving the court only one remaining filer to select. The firms and funds thus work together, and campaign contributions from any firm could have an effect on any fund in the group.

Finally, I used state-level campaign finance reports to create a dataset of campaign contributions from plaintiffs' law firms to any elected officials affiliated with the funds that selected the firms.[135] My

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[131] In rare cases this official might not be the one who appointed the board member, as when the appointed officials serve long terms and outlast elected officials. However, I assumed that the elected official in office at the time of filing would be the official the appointee might be concerned with satisfying, which should not be an unreasonable assumption if the appointee hoped to be reappointed.

[132] For instance, a member of the Teachers' Retirement System of Louisiana Board of Trustees was appointed in this fashion. *See* Teachers' Retirement System of Louisiana, Members of the Board of Trustees, http://trsl.org/general/index.php?page=Members#pastorek (last visited June 22, 2008).

[133] An ideal study of paying-to-play contributions would examine all contributions from all law firms that may be considered as lead counsel to all funds that may file as lead plaintiff. In the interest of practicality, I limited this study to contributions from law firms that were actually selected by the filing funds.

[134] *See* Choi & Thompson, *supra* note 20, at 1520 (explaining that law firms band together in order to ensure that selected lead counsel will delegate work it cannot complete to ally firms).

[135] It should be noted that I did not include states' attorneys general unless they served on, or appointed members to, the relevant funds' boards. Attorneys general, however, do

campaign contribution dataset spans from 1998 to 2008, including all contributions prior to and after the year in which the complaint was filed in the related case.[136] I included campaign contributions from any year from 1998 to 2008 in my dataset because political contributions could affect the selection of a law firm even if made several years before or after the filing of the case or the selection of the firm.[137] Contributions after filing may be relevant if a firm promised to contribute in the future in exchange for selection.

To construct my campaign finance dataset, I used followthemoney.org, the National Institute on Money in State Politics' website. The Institute collects campaign finance data in either electronic or paper form from states' disclosure agencies, where candidates must file their campaign finance reports. Followthemoney.org then displays the Institute's database on all state-level candidates in primary and general elections.[138] I used the website's "Advanced Search" tool to search for political contributions to candidates within a specific state. I then searched the filings for a particular law firm's name. This search returned all instances where both employees of the firm[139] and the firm itself made political contributions within the state. I then viewed each contribution to ascertain whether it was to an elected official associated with a pension fund in my dataset. I included in my dataset contributions made directly to the relevant candidates and also contributions to their political parties' state campaign committees. I included contributions to political parties under the theory that candidates may look favorably on contributions to

make litigation decisions for some states' pension funds. Telephone Interview with Adam Savett, Sec. Class Action Servs. (Apr. 13, 2008) (noting that Ohio Attorney General helps make litigation decisions for Ohio public pension funds). I did not include contributions to all states' attorneys general because I did not have comprehensive information on which attorneys general are involved in states' funds and which are not.

136 Followthemoney.org, the source on which I relied to construct my campaign finance dataset, has data dating back to 1988 for some states and elections, but complete data was only available for 1998 and later. Nat'l Inst. on Money in State Politics, Follow the Money, http://www.followthemoney.org (last visited Sept. 4, 2009).

137 This could be especially true if funds had developed a "short list" of firms they would consider for legal work in the future.

138 Followthemoney.org is the only website the author knows of that has aggregated public campaign financing filings from all fifty states. The media widely relies upon followthemoney.org: In 2009 alone, the Associated Press, the *National Law Journal*, the *Denver Post*, the *Albuquerque Journal*, the *Santa Fe New Mexican*, and the *Des Moines Register* all used the website's data or its experts to report on money in politics. Follow the Money, Who's Using Our Data?, http://www.followthemoney.org/Newsroom/whos_using_data.phtml?p=2009 (last visited Oct. 22, 2009).

139 Only campaign filings that reported donors' employers, as required in most states, were returned through this search. In an attempt to standardize the results, I did not search for particular donors individually by name, even if I knew they were associated with a relevant law firm.

their parties and also may benefit from party spending on their campaigns.[140] Indeed "common sense . . . confirm[s]" that contributions to party committees can have an influence on politicians or at least create the appearance of corruption.[141] As the Supreme Court noted in *McConnell v. FEC*, "It is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude."[142] Even if candidates do not place great value on party contributions, the perception that they do persists among those seeking paying-to-play reform.[143] Nonetheless, including party committee contributions could be overinclusive in that it would capture contributions from lawyers that may be based on general political ideology or meant to help a non-fund-affiliated elected official in the state. However, to disregard contributions to party committees would be to ignore an easily used and obvious loophole for lawyers wishing to hide their contributions to individual candidates.[144]

A final note: While I rely both on candidates' self-reporting of campaign contributions and the Institute's accurate compilation of that data, my campaign finance dataset is comprehensive in that it contains all contributions identified as coming from a particular law firm and going to a particular relevant pension fund official in followthemoney.org's database.

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[140] The contributions to party committees constitute twenty-seven of the 222 instances of contributions in my dataset and $754,400 of the total $2,077,837 studied (the dollar amounts are high proportionally because there is often no limit on party committee contributions).

[141] McConnell v. FEC, 540 U.S. 93, 145 (2003).

[142] *Id.* Contributors may give to party committees when they have contributed the maximum allowed to individual candidates under campaign finance laws or even perhaps to evade paying-to-play allegations. In *McConnell*, the Supreme Court provided a list of evidence of such attempts to circumvent the laws. *See id.* at 146–47 (discussing earmarking money for specific candidates, giving to joint party-candidate committees, and distributing names of party-committee donors to candidates).

[143] In passing a paying-to-play reform statute, the New Jersey state legislature noted:

> There exists the perception that campaign contributions are often made to a State or county political party committee by an individual or business seeking favor with State elected officials, with the understanding that the money given to such a committee will be transmitted to other committees in other parts of the State, or is otherwise intended to circumvent legal restrictions on the making of political contributions or gifts directly to elected State officials, thus again making elected State officials beholden to those contributors . . . .

Melanie D. Reed, *Regulating Political Contributions by State Contractors: The First Amendment and State Pay-To-Play Legislation*, 34 WM. MITCHELL L. REV. 635, 638 n.9 (2007) (quoting N.J. STAT. ANN. § 19:44A-20.13 (West 2005)).

[144] Even more contributions could be included, such as contributions from a lawyer's spouse, contributions to a nonparty committee affiliated with a politician, like a political action committee, or simply all political contributions by a lawyer in the fund's state. However, I drew the line at party-committee contributions both to keep the data manageable and to avoid being overzealous in searching for related contributions.

B. Results

I found that in a majority of cases where paying-to-play was possible, at least one law firm made a political contribution to an elected official affiliated with a lead plaintiff pension fund in the case.[145] Of the seventy-four cases in my dataset, a law firm affiliated with the case made a political contribution to a lead plaintiff pension fund in forty-one cases, or 55% of the time.[146] Because sometimes more than one law firm or more than one pension fund was affiliated in each case, there were 183 total opportunities for pension funds and law firms to be matched through political contributions. In other words, there were 183 opportunities for at least one law firm listed in my dataset as affiliated with a fund to have made a contribution to one elected official affiliated with that fund. Firms made contributions in sixty-seven of those 183 opportunities, or 37% of the time.[147] The largest cumulative contribution from a law firm and its lawyers to one or more elected officials on a fund's board in any securities case was $1.3 million, while the smallest total was $250.[148] In twenty-five of the forty-one cases, the total contributions were $5000 or more.[149]

C. Implications

My data confirms that plaintiffs' law firms are contributing to the pension funds that select them as counsel. For the first time then, it is clear that the campaign contributions that could be the basis of paying-to-play are present across a broad range of cases. The amount of money contributed by firms is also significant. In only sixteen of the forty-one cases where contributions were made were the total contributions less than $5000.[150]

These contributions form the baseline of the paying-to-play theory. Previously, a response to paying-to-play allegations could have been that law firms were not contributing to elected officials affiliated with pension funds at all. My study rules out that response

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145 My complete results have been posted in the *New York University Law* Review's online data repository. *See* Drew T. Johnson-Skinner, Paying-To-Play in Securities Class Actions: A Look at Lawyers' Campaign Contributions, NYU LAW REVIEW DATAVERSE (Oct. 19, 2009), http://hdl.handle.net/1902.1/13769.

146 *Id.*

147 *Id.* The disparity between the percentage of cases where contributions were made and the percentage of total opportunities where contributions could have been made exists because in any one case, many law firms and many funds may have filed a complaint and sought to be class counsel and lead plaintiff, but a contribution from only one law firm to one fund was sufficient to mark that case as one where a political contribution was made. The other firms may not have contributed to the other funds in that particular case.

148 *Id.*

149 *Id.*

150 *Id.*

and provides the first set of paying-to-play data on which future scholarship can build. Some may argue that these contributions alone create an appearance of impropriety that should be avoided. On the other hand, some suggest that mere campaign contributions are not a problem and that the focus should be on the actual performance of class counsel, no matter how selected.[151] The resolution of this question is beyond the scope of this Note. I observe only that the solutions to the "problem" proposed to date are not without costs and should not be implemented without a full understanding of the practice. It may be that the appearance of impropriety from contributions alone is not enough to justify the costs of the proposed reforms, or it may be that reforms are indeed necessary.

Of course, the concern over paying-to-play is comprised of more than merely political contributions. The paying-to-play theory has three basic elements: (1) law firms are giving political contributions to officials affiliated with pension funds' boards; (2) the firms are doing so with the intention of earning favors from the funds; and (3) pension funds are in fact giving those favors by selecting contributing firms as class counsel in class action cases. While this Note has provided some evidence of the presence of element one, we must examine elements two and three to understand fully the potential paying-to-play problem and to formulate an appropriate policy response. The rest of this Part, then, provides a roadmap for future researchers in examining these questions.

D. Suggestions for Future Research

This Note has presented the baseline campaign contribution data that previous accounts of the paying-to-play problem have ignored. The data I collected, however, cannot explain why firms contribute to pension funds or the role that campaign contributions actually play in funds' counsel-selection decisions. Future researchers might attempt to quantify additional considerations that may explain law firms' contributions or that institutional investors might use in selecting a firm. Researchers could study whether campaign contributions, or any of these additional factors, are statistically relevant to a firm's likelihood to contribute or to a fund's decision to hire a particular law firm. The factors listed below are not meant to be an exhaustive list of all important matters but rather a helpful guide for future researchers of what I consider to be the most interesting quantifiable factors surrounding the paying-to-play problem.

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[151] *See* Coffee, Jr., *supra* note 82, at 246 (suggesting that campaign contributions may not impact attorney performance negatively).

1. *Geography*

Geography may be one factor that is important to pension funds when selecting class counsel. Pension funds might be likely to select local law firms with whom they are familiar and with whom they can meet frequently. This may be especially true if pension funds plan to, or have been, working with firms for a long period of time, such as funds hiring a firm to provide litigation monitoring services.[152] Geography might drive a fund's law firm–selection decision, regardless of the political contributions received by the fund's leadership.

In addition to being a useful factor for researchers seeking to explain pension funds' counsel-selection decisions, geography may be important for researchers seeking to understand law firms' political contributions. Contributions from lawyers to politicians in their own states may seem less suspicious than those in distant states. After all, lawyers interested in good governance or a particular political ideology have an interest in electing candidates in their own state and may contribute to their home-state candidates' campaigns regardless of paying-to-play considerations. On the other hand, contributions from New York lawyers to obscure Louisiana state legislators who happen to serve on pension fund boards, for example, are harder to explain absent a paying-to-play rationale.

2. *Experience*

A law firm's experience representing plaintiffs in securities fraud class actions might also influence a pension fund's counsel-selection decisions. As presented in Table 1 below, based on my data, from 2002 to 2006, pension funds selected the same few law firms repeatedly. Bernstein Litowitz Berger & Grossman, for instance, was affiliated with an institutional plaintiff in twenty-nine of the seventy-four cases in my dataset, or 39% of the cases.[153] Lerach Coughlin Stoia Geller Rudman & Robbins[154] was involved in seventeen cases, or 23% of the cases.[155] On the other hand, pension funds selected twenty-nine of the thirty-nine total firms each three or fewer times.[156] While funds select some firms without extensive securities fraud class action experience, the lion's share of the work goes to the same two or three firms. Future research could quantify indicators of a law firm's

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152 *See infra* note 164 and accompanying text (noting that some funds hire firms to monitor investments and then advise as to possible litigation in connection with investments).

153 Johnson-Skinner, *supra* note 146.

154 See *infra* note 159 for a chronology of this firm's changing name over the studied period.

155 Johnson-Skinner, *supra* note 146.

156 *Id.*

experience, such as the number of previous securities fraud class action cases handled, in an effort to discover whether experience is an independently significant variable in funds' counsel-selection decisions, or whether other factors dictate how often funds select a firm.

An examination of this factor may also help to illuminate John C. Coffee, Jr.'s suggestion that political officials are not only accepting direct campaign contributions in exchange for lead counsel appointments but also requesting the power to direct which other firms join in to share the class counsel's profits. Coffee described a scenario where an official agrees to award a contract to a law firm if the firm will bring in an (often inexperienced) firm where a friend of the official may serve as partner.[157]

Table 1
Number of Cases in Which Law Firm Was Selected[158]

Firm Name	*Number of Cases*
Bernstein Litowitz Berger & Grossman	29
Lerach Coughlin Stoia Geller Rudman & Robbins[159]	17
Grant & Eisenhofer	11
Schiffrin & Barroway[160]	7
Berman DeValerio Pease Tabacco Burt & Pucillo[161]	7
Labaton Sucharow & Rudoff[162]	6
Entwistle & Cappucci	4
Lite DePalma Greenberg & Rivas	3
Milberg Weiss[163]	3
8 Other Firms	2
21 Other Firms	1
Total	90

157 *See* Coffee, Jr., *supra* note 107, at 7 (arguing that such scenario is "suspicious" and "suggests that someone may have been bribed").

158 The data in this table was compiled from the data provided to me from Securities Class Action Services, *see supra* Part III.A, and covers the seventy-four cases in my dataset from 2002 to 2006 where an institutional investor with at least one state-level elected official on its board filed as lead plaintiff.

159 Currently Coughlin Stoia Geller Rudman & Robbins, this firm did not exist before 2004. It was created in May 2004 when Bill Lerach split from then–Milberg Weiss Bershad Hynes & Lerach. Peter Elkind, *The Law Firm of Hubris Hypocrisy & Greed*, Fortune, Nov. 13, 2006, at 154. When the firms split, Bill Lerach kept Milberg's California offices and business for his new firm, then–Lerach Coughlin Stoia Geller & Robbins.

160 Currently Barroway Topaz Kessler Meltzer & Check.

161 Currently Berman DeValerio.

162 Currently Labaton Sucharow.

163 Currently Milberg.

3. Previous Relationships

In addition to general experience in class action litigation, funds may be more likely to select firms with which they have had a former relationship. This might mean that a firm has represented the fund in a previous class action, but it could also include a law firm that provided investment monitoring services for a fund. According to one securities class action expert, funds increasingly are relying on law firms to monitor their investments and to give advice on possible suits to file or litigation to join.[164] Funds typically do not pay the law firms for these litigation and investment monitoring services, but the firms instead hope to be rewarded by being selected as class counsel if the fund decides to file suit and is named lead plaintiff.[165] At a hearing in a recent case, a New York federal district judge raised concerns that a proposed plaintiff law firm had a "blatant, shocking conflict of interest" stemming from free monitoring services provided for a union pension fund client.[166] In ruling on the case, Judge Jed S. Rakoff noted that the monitoring arrangement went "far beyond any traditional contingency arrangement" and "create[d] a clear incentive" for the law firm to "discover 'fraud'" and recommend that the fund sue; "[i]n other words, the practice fosters the very tendencies toward lawyer-driver litigation that the PSLRA was designed to curtail."[167] Judge Rakoff did not rule on whether the monitoring arrangement ultimately violated ethics rules because he found the union fund was not otherwise fit to serve as lead plaintiff.[168]

Additionally, pension funds have been reported to keep "short lists" of firms that have been prescreened to use when the fund decides to file suit.[169] In these cases, the firm that provides investment monitoring services has competition from other firms on the fund's

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[164] Savett, *supra* note 135.

[165] *Id.*

[166] Kevin M. LaCroix, *Judge Explains Lead Plaintiff Selection, Addresses Conflict Question*, THE D&O DIARY, May 28, 2009, http://www.dandodiary.com/2009/05/articles/securities-litigation/judge-explains-lead-plaintiff-selection-addresses-conflict-question/.

[167] Iron Workers Local No. 25 Pension Fund v. Credit-Based Asset Servicing & Securitization, LLC, 616 F. Supp. 2d 461, 464 (S.D.N.Y. 2009); *see also* LaCroix, *supra* note 166 (discussing *Iron Workers*). It should be noted that another New York federal district judge, Judge Barbara S. Jones, was confronted with a similar question and stated that "the Court has been shown no reason why this monitoring system causes any issues or impediments to the firm's representation." Plumbers, Pipefitters & Apprentices Local No. 112 Pension Fund v. CIT Group Inc., No. 08 Civ. 6613, at 5 (S.D.N.Y. May 26, 2009), *available at* http://www.oakbridgeins.com/clients/blog/pipefitters.pdf. For a discussion of whether monitoring services are another way to pay-to-play or are necessary for thinly staffed pension funds, see Coffee, Jr., *supra* note 107, at 7.

[168] *Iron Workers*, 616 F. Supp. 2d at 466.

[169] Savett, *supra* note 135.

list. Pension funds without exclusive lists rely on "requests for proposal," which are sent to law firms, inviting them to bid for the pension fund's legal work.[170] Any of these arrangements may shed light on law firms' decisions to contribute to funds or may impact funds' law firm–selection decisions.

Conclusion

Past fears, and even reforms, of paying-to-play have been based predominately on anecdotal evidence in the media and scholarly literature. In this Note, I provide empirical evidence for the first time showing that plaintiffs' law firms do contribute to officials affiliated with the public pension funds that select them as class counsel in securities fraud class actions. While we cannot know the effects these contributions have on law firm selection, this new data at least provides a baseline for future inquiry into paying-to-play. As a guide to future researchers, I offer several factors that may help explain why law firms contribute to pension funds and whether campaign contributions actually affect funds' choice of law firms. This additional research would help to complete our understanding of paying-to-play.

Still one more question would remain: Even if the worst paying-to-play fears are true and pension funds *are* selecting law firms based on political contributions, does paying-to-play actually have a negative effect on lawyer-client agency costs and on counsel performance in securities fraud class actions? In other words, even if paying-to-play is happening, does it matter? One way to examine this question would be to compare lawyers selected through a suspected paying-to-play practice with lawyers where no suspect political contributions were made and then examine indicators of lawyer quality. Whether paying-to-play ultimately is found to be harmful or benign, we will have done well to understand whether the practice exists and the damage it does before attempting to eliminate it.

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170 *Id.*