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*Presenting a live 90-minute webinar with interactive Q&A*

# Defeating Event-Driven Securities Class Actions

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THURSDAY, JUNE 27, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Matthew A. Schwartz, Partner, **Sullivan & Cromwell LLP**, New York

Dr. David Tabak, Managing Director, **NERA Economic Consulting**, New York

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# **Defeating Event-Driven Securities Class Actions Strafford Webinar June 27, 2019**

Matthew Schwartz  
Sullivan & Cromwell

David Tabak  
NERA Economic Consulting



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# **Latest trends in event-driven securities class actions**

# Examples of “event-driven” securities class actions

## Product Issues

- Volkswagen
- Boeing
- Pharmaceuticals

# Examples of “event-driven” securities class actions

## Disasters

- BP
- Cyber breaches



# Examples of “event-driven” securities class actions

Government lawsuits regarding misstatements concerning conflicts of interest

- Goldman Sachs
- Barclays

# Examples of “event-driven” securities class actions

Government Investigations regarding alleged violations of law

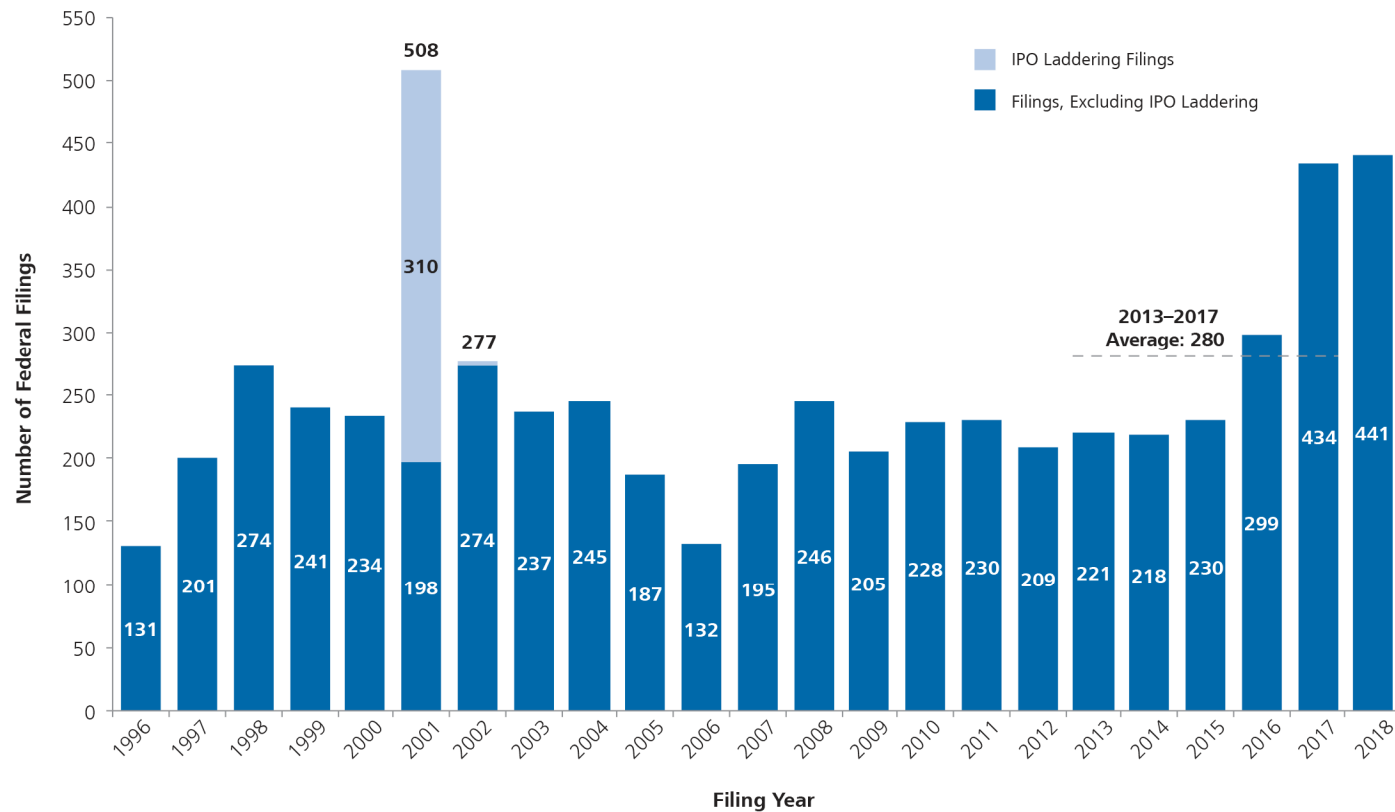
- Walmart
- Omnicare

# Examples of “event-driven” securities class actions

Me Too

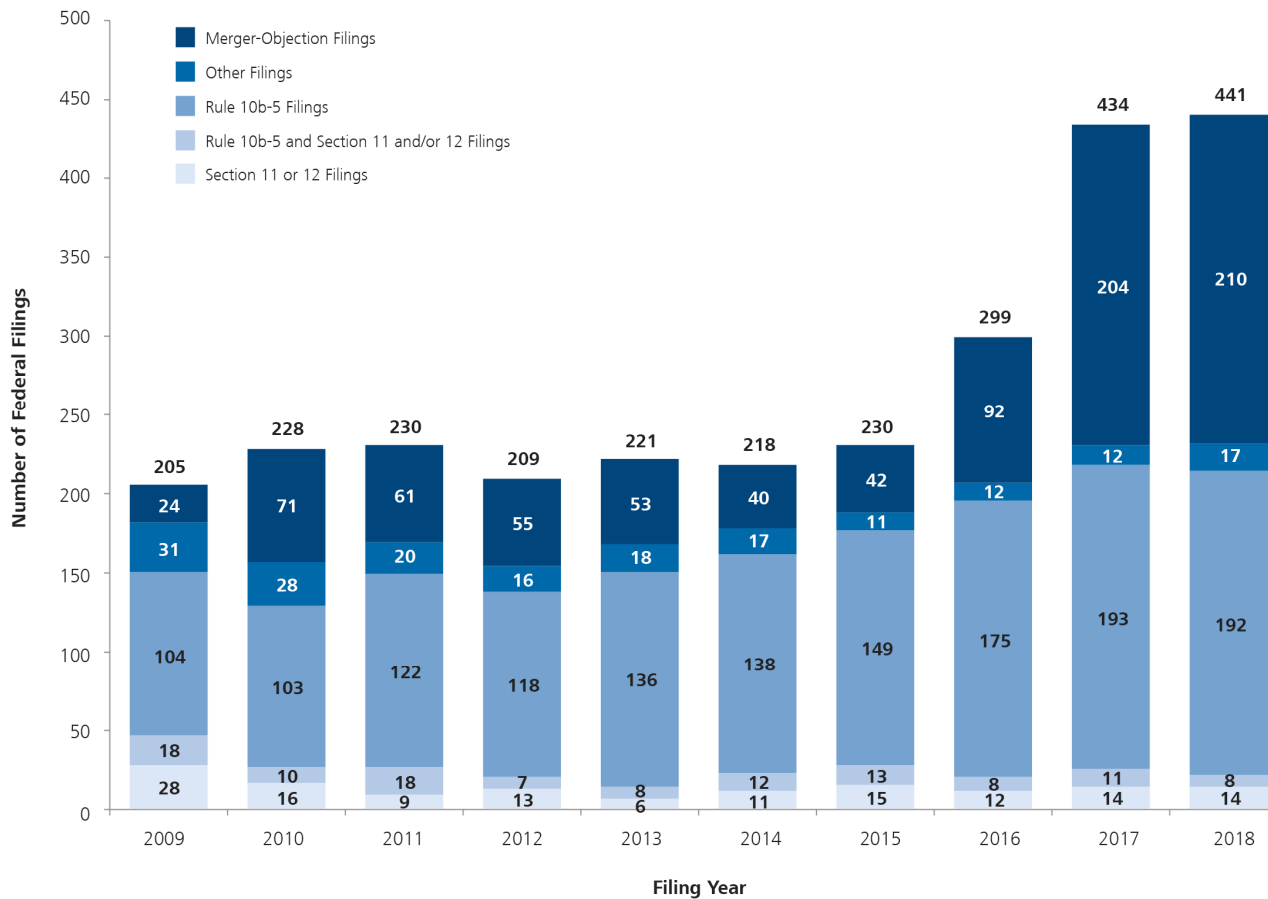
# Securities Class Actions Have Been Rising

Figure 1. **Federal Filings**  
January 1996–December 2018



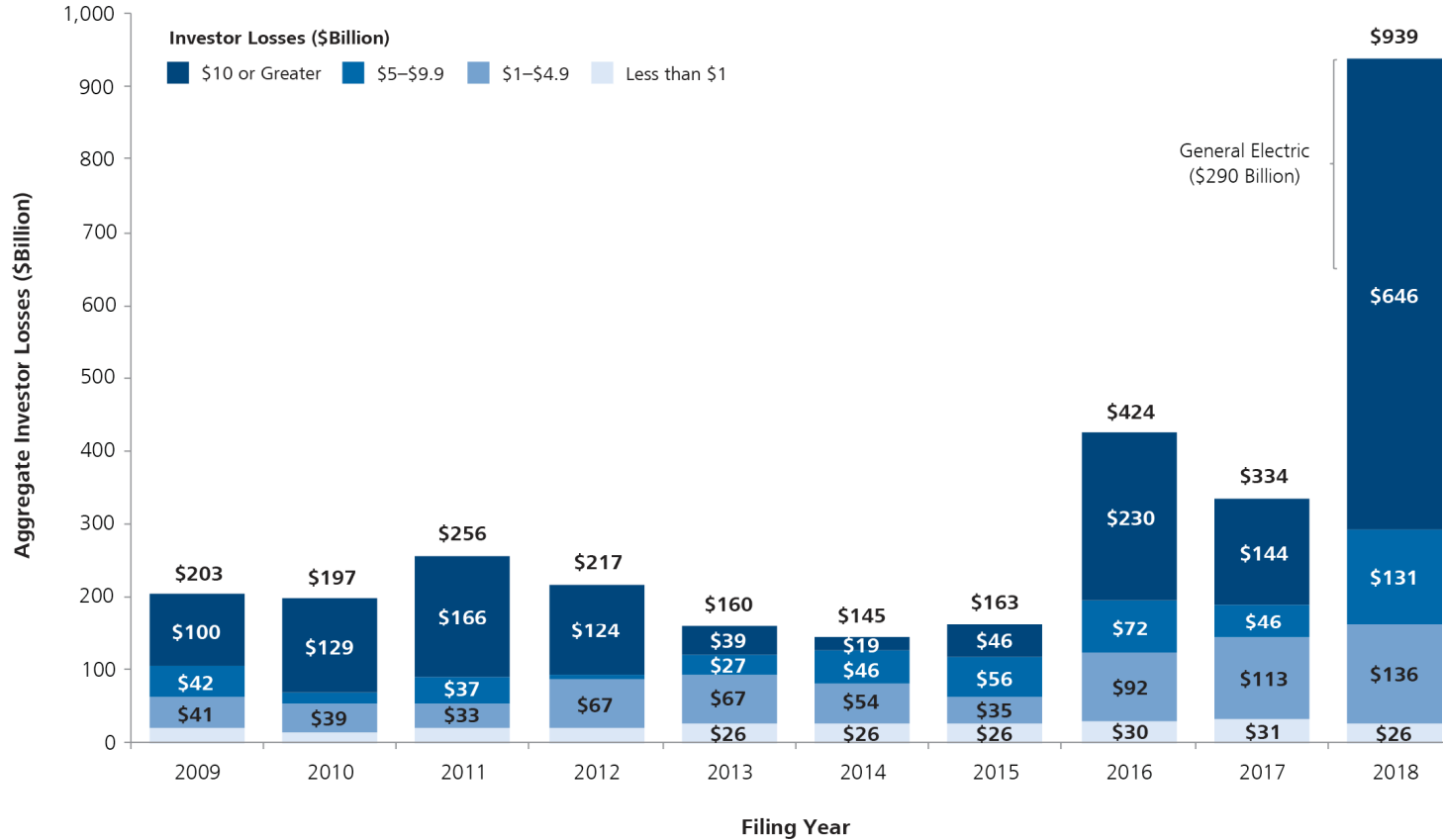
# Even Non-Merger-Objection Cases Are Up

Figure 3. **Federal Filings by Type**  
January 2009–December 2018



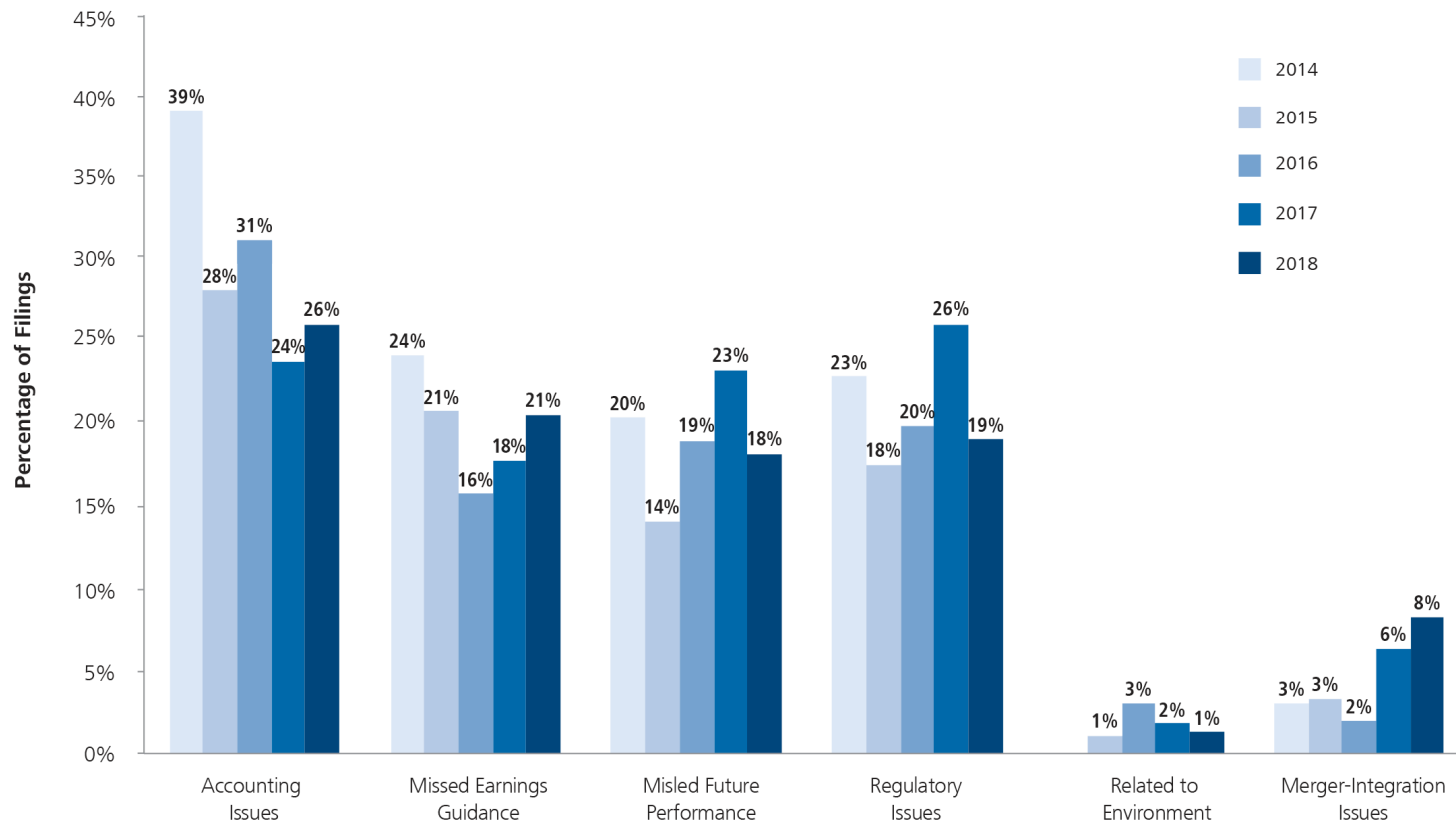
# The Magnitude of Cases Is Up

Figure 8. **Aggregated NERA-Defined Investor Losses**  
Shareholder Class Actions with Alleged Violations of Rule 10b-5, Section 11, and/or Section 12  
January 2009–December 2018



# Accounting Cases Down Event and Other Cases Steady or Up

Figure 12. **Allegations**  
Shareholder Class Actions with Alleged Violations of Rule 10b-5, Section 11, and/or Section 12  
January 2014–December 2018



## Results have varied based on statements at issue:

- Generic statements that do not reveal the problem or potential for the problem *may be* sufficient to be actionable  
*Omnicare v. Laborers Dist. Council Const.*, 135 S. Ct. 1318, 575 U.S., 191 L. Ed. 2d 253 (2015).
- But some statements are inactionable puffery, and there is no affirmative duty to disclose such issues

*Singh v. Cigna*, 918 F.3d 57 (2d Cir. 2019)



# Do Different Alleged Misstatements Matter?

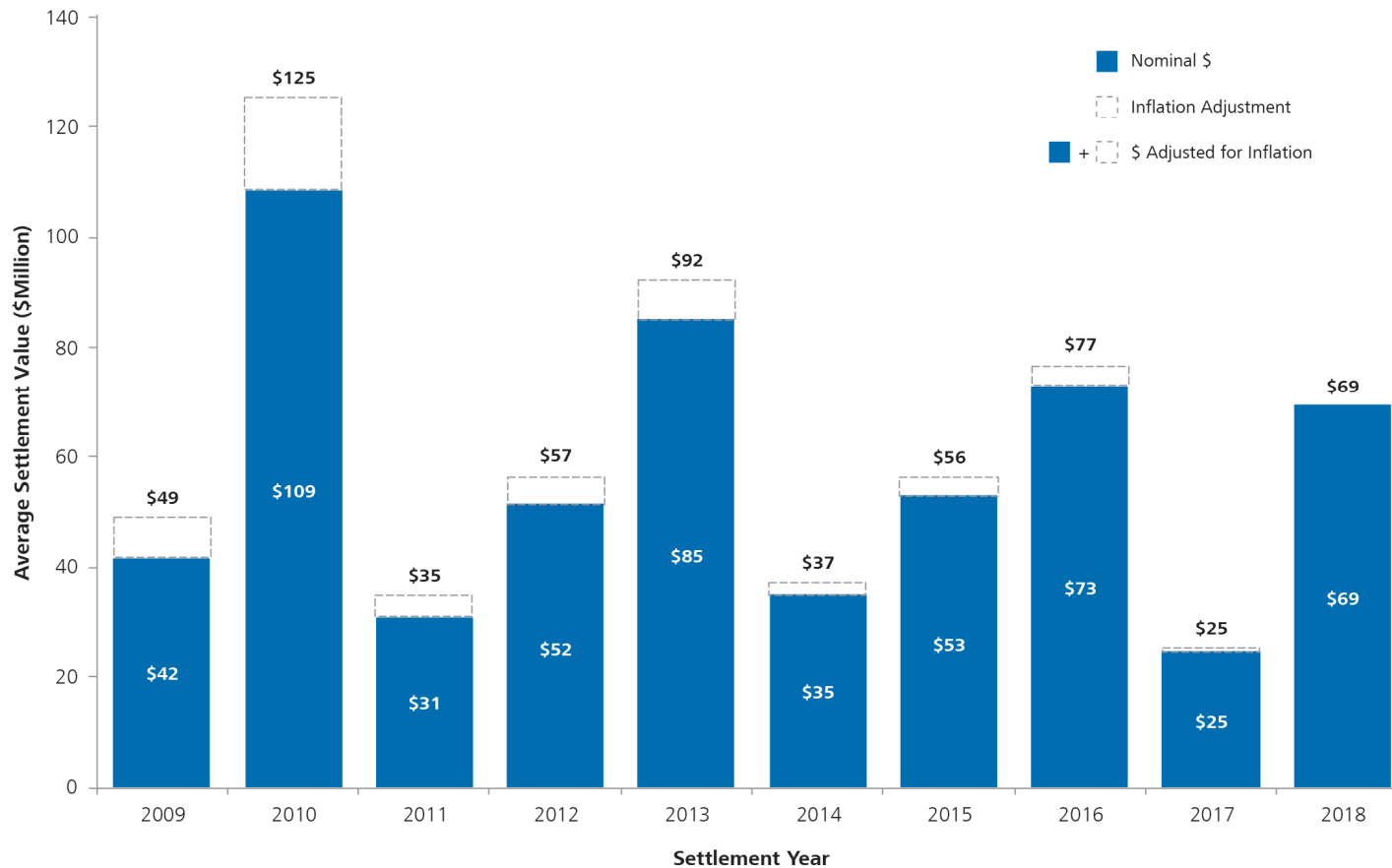
## Compare and Contrast:

*Goldman Sachs*: “by putting the topic of the cause of its financial success at issue, [a company] then [ ] is obligated to disclose information concerning the source of its success, since reasonable investors would find that such information would significantly alter the mix of available information.”

*Singh v. Cigna*: Rejecting an “attempt [that] relies on a simple equation: first, point to banal and vague corporate statements affirming the importance of regulatory compliance; next, point to significant regulatory violations; and voila, you have alleged a prima facie case of securities fraud! The problem with this equation, however, is that such generic statements do not invite reasonable reliance.”

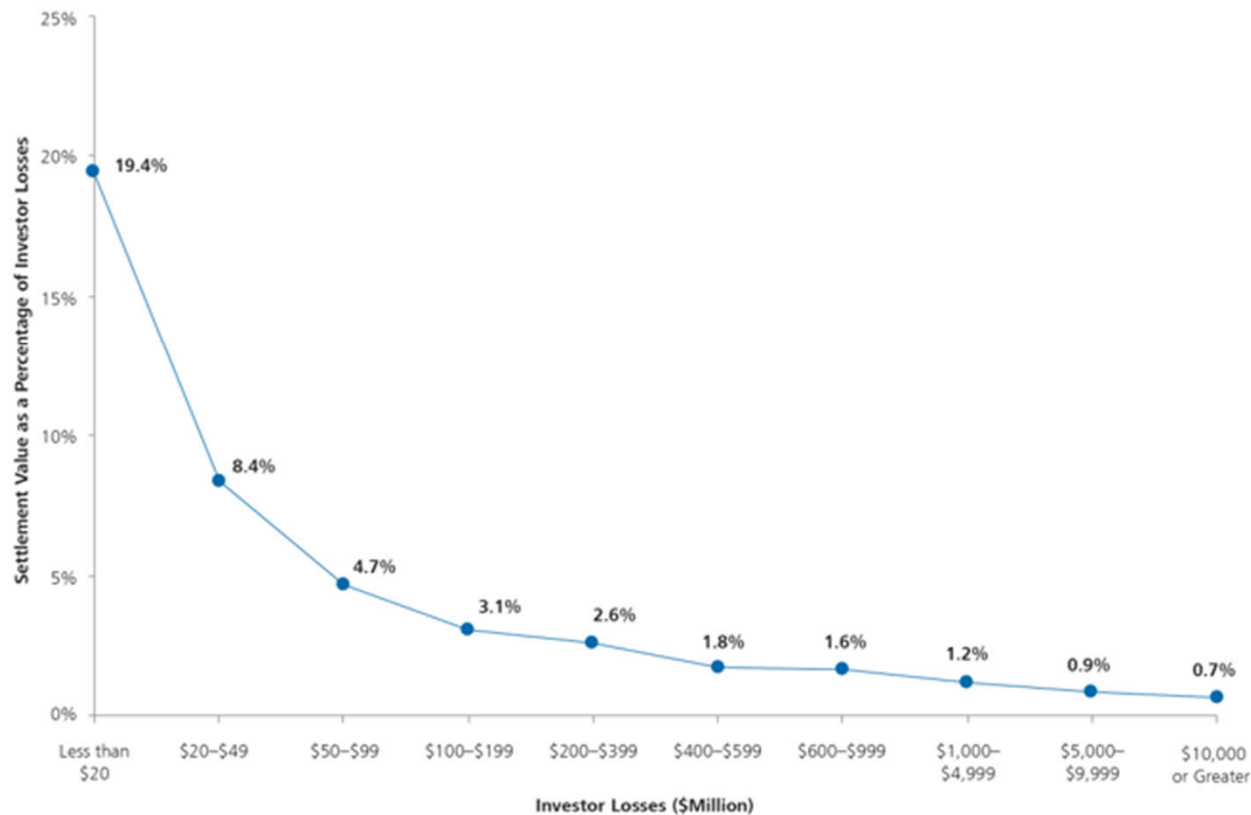
# Settlement Values Are Volatile

Figure 22. **Average Settlement Value**  
Excludes Merger Objections and Settlements for \$0 to the Class  
January 2009–December 2018



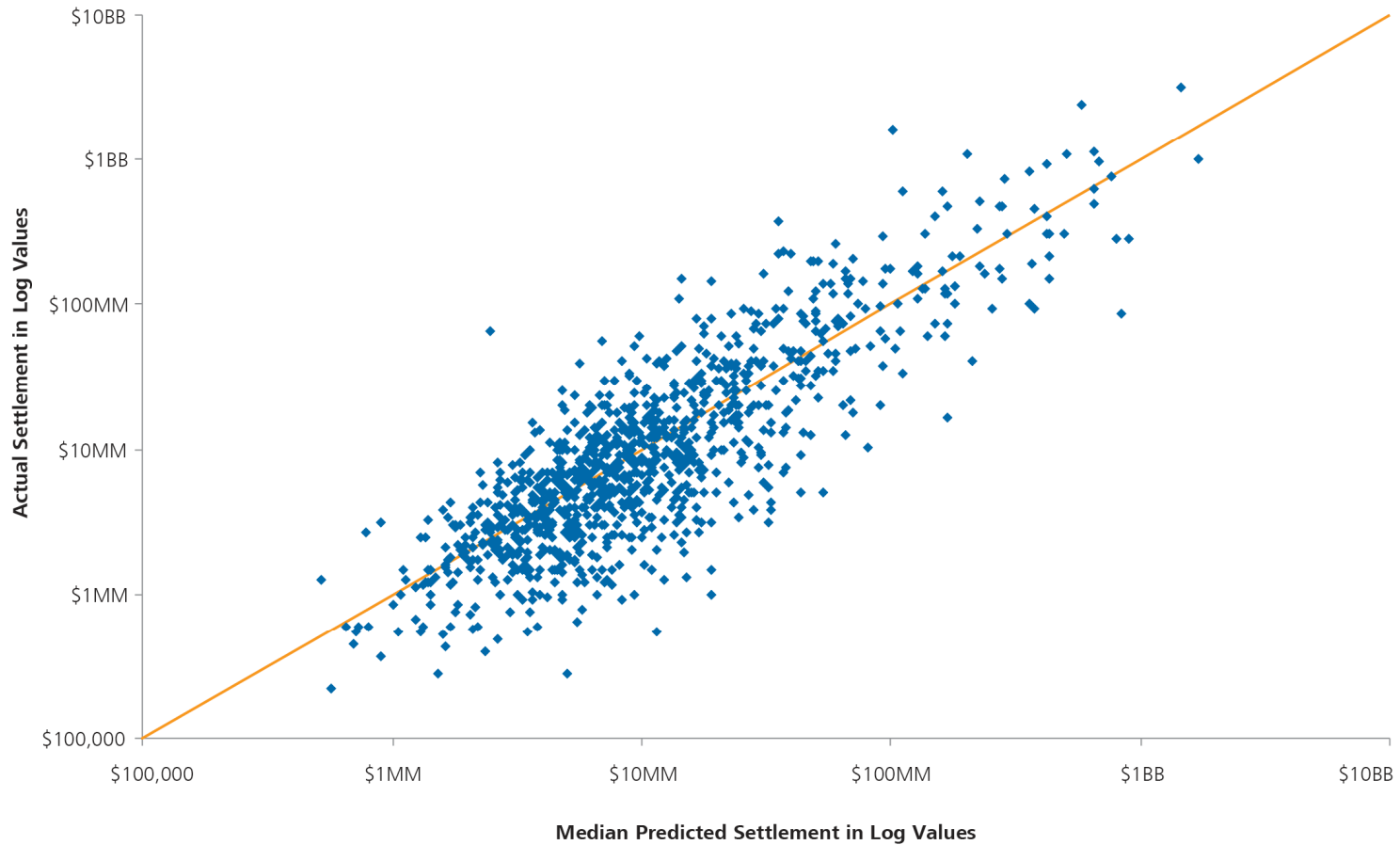
# Settlements As a Share of Losses

Figure 27. **Median of Settlement Value as a Percentage of NERA-Defined Investor Losses by Level of Investor Losses**  
Excludes Settlements for \$0 to the Class  
January 1996–December 2018



# Settlements Are Somewhat Predictable

Figure 29. Predicted vs. Actual Settlements





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# **Class-Certification Issues**

- Would “truthful” disclosure have affected the price of the security ***at the time of the alleged misrepresentation/omission?***
- Best challenges against non-equity securities
- Successful Challenge Against NYSE-Traded Security in *Ohio Public Employees Retirement System v. Federal Home Loan Mortgage Corp.*, (N.D. Ohio Aug. 14, 2018).
  - Plaintiffs’ expert failed to follow relevant literature

# Materialization of the Risk?

- Can one certify a class asking for damages equal to the full price decline as of the materialization of the risk?
  - *In Re BP PLC Securities Litigation*, MDL No. 10-md-2185 (S.D. Tex. Sept. 30, 2014.)
- If an alleged misstatement or omission is immaterial, can it cause a price impact?
  - *Amgen v. Conn. Ret. Plans*, 568 U.S. 455 (2013)

# Common Damages Methodology

- Supreme Court allows for decertification of class because damages methodology not consistent with remaining allegations. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 569 U.S. 27, 185 L. Ed. 2d 515 (2013).
- Defendants have tried to use at class certification stage.
  - Timely or premature?





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# **Types of claims and defenses**

# Section 10(b) vs. Section 11

- What needs to be disclosed in each?



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## **Defenses: Damages**

# Probability of Event

- Inflation at purchase may be less than price drop at disclosure.
- “One could not reasonably estimate how the public would have reacted to the news that the Titanic was near an iceberg from how it reacted to news that the ship had struck an iceberg and sunk.”
  - *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 170 (2d Cir. 1980).

# Probability of Event

- *Basic Inc. v. Levinson*, 485 U.S. 224, 238 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988).

“...with respect to contingent or speculative information or events, in a manner that gave that term meaning that is independent of the other provisions of the Rule. Under such circumstances, materiality ‘will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.’”

# Adjusting Inflation Over Time

- Was the “amount” of the allegedly misrepresented information constant?
  - “Events” are usually not 100% predictable



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**Summary: Where are we headed  
and what can we do?**

# Who Are The Players?

- New plaintiffs' firms seizing on event-driven cases



# Timing, Timing, Timing

- Consider your potential arguments early:
  - Get/provide the right discovery to test your arguments
  - Determine what factual support and expert analysis you will need (e.g., what was the probability that the event would materialize given what was known at earlier points in time?)
  - Use *Comcast* to your advantage in preparing for damages

# Further Considerations

- No trials yet (note: Puma Biotech – a pharmaceuticals trial on liability, but limited on damages)

# Further Considerations

- Impact of *Cyan, Inc. v. Beaver County Employees*, 138 S. Ct. 1061, 583 U.S., 200 L. Ed. 2d 332 (2018)?

# Further Considerations

- Impact of *Lorenzo v. SEC*, 138 S. Ct. 2650 (U.S. 2018)?

# Further Considerations

- Pressure to resolve cases and “move on” from the event



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## Thank You

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