# DEPLOYMENT OF INSTITUTIONS IN THE SECURITIES CLASS ACTION WARS

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*"The Conference Committee believes that increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions."*[1]

Authors Grundfest and Perino[2] aptly analyze both the potential strategies for institutional investor involvement in securities class action lawsuits and the balance of risks and benefits associated with such shareholder activism. However, to more fully understand the challenges and opportunities which await large shareholders in these lawsuits after enactment of the Private Securities Litigation Reform Act of 1995 ("the Act"),[3] this Comment explores the implications behind Congress' attempt to encourage institutions to take a more active role in securities class actions.

This Comment discusses the special role contemplated for institutions by the Act and argues that the courts should respect Congress' intent by facilitating efforts of institutions that take up the challenge. The Comment also suggests a range of alternative actions for consideration by institutional investors that seek to further pursue their rights in private securities litigation.

## IMPETUS FOR CHANGE

The legislative history of the Act is rife with Congressional findings on flaws and abuses of the current private securities litigation system.[4] The

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1. H.R. REP. NO. 369, 104th Cong., 1st Sess. 31, 34 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 733, Joint Explanatory Statement of the Committee of Conference, Statement of Managers—The "Private Securities Litigation Reform Act of 1995."

2. Joseph A. Grundfest & Michael A. Perino, *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation*, 38 ARIZ. L. REV. 559 (1996).

3. The Private Securities Litigation Reform Act of 1995 was passed by Congress on December 22, 1995 over President Clinton's veto and became Public Law No. 104–67, 109 Stat. 737 (1995) (to be codified at 15 U.S.C. §§ 77a et seq.). The override vote in the House of Representatives was 319 to 100. The vote in the Senate was 68 to 30. Among other things, § 101 of the Act provides for appointment of the plaintiff class member with the largest financial interest as lead plaintiff, to select class counsel and monitor the litigation.

4. For example, the Senate Committee on Banking, Housing and Urban Affairs Report No. 104–98, June 19, 1995, which accompanied the Committee's recommendation of the original version of the legislation passed by the Senate (S. 240), contained the following findings on the securities class action system:

Statement of Managers issued by the Conference Committee which developed the final version of the legislation that became the Act included the following summary of Congress' findings:

> The House and Senate Committees heard evidence that abusive practices committed in private securities litigation include: (1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability; (3) the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle; and (4) the manipulation by class action lawyers of the clients whom they purportedly represent. These serious injuries to innocent parties are compounded by the reluctance of many judges to impose sanctions under Federal Rule of Civil Procedure 11, except in those cases involving truly outrageous misconduct.[5]

Whether or not one agrees with these findings, it is clear that impetus for the Act came out of a strong belief on the part of Congress that our private securities litigation system is in need of repair.[6] In fact, the legislative history indicates Congress' frustrations went beyond securities litigation to concerns with misuse of our litigation system in general.[7]

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> As Chairman D'Amato made clear, "There is broad agreement on the need for reform. Shareholders' groups, Corporate America, the SEC, and even lawyers all want to curb abusive practices. Lawyers who bring meritorious suits do not benefit when strike suit artists wreak havoc on the Nation's boardrooms and courthouses. Our economy does not benefit when the threat of litigation deters capital formation." Senator Dodd similarly said: "The flaws in the current private securities litigation system are simply too obvious to deny. The record is replete with examples of how the system is being abused and misused." SEC Chairman Arthur Levitt concurred: "[T]here is no denying that there are real problems in the current system—problems that need to be addressed not just because of abstract rights and responsibilities, but because investors and markets are being hurt by litigation excesses."

S. REP. NO. 98, 104th Cong., 1st Sess. 5 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 684, quoting statement of Chairman Alfonse M. D'Amato, Hearing on Securities Litigation Reform Proposals: Subcommittee on Securities, Senate Committee on Banking, Housing, and Urban Affairs, Mar. 2, 1995; statement of Senator Christopher J. Dodd, Hearing on Securities Litigation Reform Proposals: Subcommittee on Securities, Senate Committee on Banking, Housing, and Urban Affairs, Mar. 2, 1995; Arthur Levitt, *Between Caveat Emptor and Caveat Vendor: The Middle Ground of Litigation Reform*, Remarks at the 22nd Annual Securities Regulation Institute, San Diego, Cal. (Jan. 25, 1995). The House of Representatives Committee on Commerce Report No. 104–50 (Part 1), Feb. 24, 1995, covering the House version of the original bill (H.R. 10), also contained similar findings. H.R. REP. NO. 50, 104th Cong., 1st Sess. 14, pt. 1 (1995).

5. H.R. REP. NO. 369, *supra* note 1, at 31, *reprinted in* 1995 U.S.C.C.A.N. 679, 730.

6. The author makes no independent judgment on the accuracy of Congressional findings reflected in the Conference Committee's Report, but presumes that Congress believes what it said, particularly given the substantial margins by which the Act was passed in both the House and Senate and the bipartisan support it had. *See supra* note 3.

7. For example, the House Committee Report included the following findings:

> America has become an excessively litigious society. We sue each other too often and too easily, and the consequences affect all of us. The dramatic growth in litigation carries high costs for the American economy—manufacturers withdraw

## THE ROLE FOR INSTITUTIONS

It is in this context that Congress chose to provide a special role for institutional investors through the Act. To address what was called the "race to the courthouse" under the old system, where the first lawyer to file an action and her plaintiff were generally designated to lead the class, the Act creates a new process where notice of the lawsuit is published and the court selects the "most adequate plaintiff" to lead the class. Subject to meeting other class action representation requirements, the plaintiff with "the largest financial interest in the relief sought by the class" who volunteers for the job is deemed to be the most adequate plaintiff and can be appointed by the court as "lead plaintiff."[8] The lead plaintiff is responsible for selecting counsel to represent the class, subject to court approval, and for monitoring the case on behalf of the class.

Institutional shareholders were singled out by Congress as the most desired candidates for lead plaintiff. The legislative history cites two primary reasons for this preference. First, institutions are often the largest claimants in securities class actions and have the greatest financial stakes in the outcome.[9] Second, institutions tend to be broad owners of American corporations, giving them a balanced view of the impact of private securities litigation, not just on the plaintiffs and company in a particular lawsuit but also on the U.S. securities markets in general.[10]

The Conference Committee's Statement of Managers described Congress' reasons for preferring institutions:

> The Conference Committee seeks to increase the likelihood that institutional investors will serve as lead plaintiffs by requiring courts to presume that the member of the purported class with the largest financial stake in the relief sought is the "most adequate plaintiff...." Scholars predict that increasing the role of institutional investors will benefit both injured shareholders and courts: "Institutions with large stakes in class actions have much the same interests as the plaintiff class generally; thus, courts could be more confident settlements negotiated under the supervision of institutional plaintiffs were 'fair and reasonable' than is the case with settlements negotiated by unsupervised plaintiffs' attorneys."[11]

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> products from the market, discontinue product research, reduce their workforces, and raise their prices.... Congress enacted the Federal securities laws in 1933 and 1934 to protect investors and promote the efficient functioning of our capital markets. Today, private lawsuits under those statutes create precisely the opposite effect.

H.R. REP. NO. 50, *supra* note 4, pt. 1 at 14.

8. Pub. L. No. 104–67, § 101, 1995 U.S.C.C.A.N. (109 Stat.) 737, 739.

9. According to the results of a study by Elliott J. Weiss and John S. Beckerman, the 50 largest claimants in securities class actions account for an average of 58% of all losses and institutional investor claims make up the great majority of large claims, accounting for an average of 46% of all class claims. 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, 2089 n.197 (1995).

10. According to *The Brancato Report on Institutional Investment*, institutions own more than 57% of outstanding stock of the top 1000 U.S. public corporations. 2 THE VICTORIA GROUP INC., THE BRANCATO REPORT ON INSTITUTIONAL INVESTMENT 10–11 (3d ed. Sept. 1995).

11. H.R. REP. NO. 369, *supra* note 1, at 34–35, *reprinted in* 1995 U.S.C.C.A.N. 679, 733–34.

Congress apparently engaged in significant debate on potential conflicts of interest that could result from an institution's large equity holdings. However, Congress ultimately chose to embrace the broader perspective of large shareholders as beneficial to the process. In its original version of the legislation, the Senate report on the lead plaintiff provision directly addressed this point: "The Committee believes that an institutional investor acting as lead plaintiff can, consistent with its fiduciary obligations, balance the interests of the class with the long-term interests of the company and its public investors."[12]

## PREFERENCE FOR PENSION FUNDS AS LEAD PLAINTIFFS

While endorsing the overall value that institutions in general can add to the private securities litigation system, Congress specifically recognized pension funds as having the most appropriate characteristics for selection as a lead plaintiff. Unlike many other institutions that could arguably be motivated by the self-serving interests of wealthy individuals or a profit-seeking company, pension funds are obligated as fiduciaries to act in the best interests of their participants, the average American working person.

The Conference Committee's Statement of Managers described Congress' endorsement of pension funds as lead plaintiffs:

> Several Senators expressed concern during floor consideration of this legislation that preference would be given to large investors, and that large investors might conspire with the defendant company's management. The Conference Committee believes, however, that with pension funds accounting for $4.5 trillion or nearly half of the institutional assets, in many cases the beneficiaries of pension funds—small investors—ultimately have the greatest stake in the outcome of the lawsuit. Cumulatively, these small investors represent a single large investor interest. Institutional investors and other class members with large amounts at stake will represent the interests of the plaintiff class more effectively than class members with small amounts at stake.[13]

This is a critical point. The lead plaintiff provisions of the Act spring directly from Congressional findings that large shareholders will, by virtue of having the largest economic interests in the class, "improv[e] the quality of representation in securities class actions"[14] regardless of existing relationships with management of the company or overall ownership interests in corporate America. Furthermore, Congress specifically endorsed pension funds as the most inherently qualified institution to serve as class representative.

## A MATTER FOR JUDICIAL DEFERENCE

Because it is remedial legislation aimed at repairing flaws in the securities class action litigation system, the Act must be interpreted broadly to achieve Congress' intent.[15] That intent was clearly to encourage institutional

12. S. REP. NO. 98, *supra* note 4, at 11, *reprinted in* 1995 U.S.C.C.A.N. at 690.

13. H.R. REP. NO. 369, *supra* note 1, at 34, *reprinted in* 1995 U.S.C.C.A.N. 679, 733 (citing 2 THE VICTORIA GROUP INC., THE BRANCATO REPORT ON INSTITUTIONAL INVESTMENT, TOTAL ASSETS AND EQUITY HOLDINGS (1st ed.)).

14. *Id.*

15. *See, e.g.*, Piedmont & N. Ry. Co. v. Interstate Commerce Comm'n, 286 U.S. 299 (1932) (holding that the Federal Transportation Act, as a remedial statute, must be liberally interpreted to achieve its intended purpose of developing a national railway system).

involvement so that shareholders and the courts could reap the benefits of their resources and expertise.[16] In fact, Congress was so confident that institutions and other large shareholders would represent the best interests of the class that the Act established a presumption that the shareholder with the largest financial interest is best qualified to oversee the plaintiffs' litigation,[17] and the Conference Committee forbade the courts from imposing any new fiduciary duty that would interfere with institutions playing that role.[18]

Consequently, absent specific evidence that a particular institution is subject to unique defenses that would make it incapable of fairly and adequately representing the class,[19] institutions that choose to take an active role in securities class actions are entitled to protection and encouragement by the courts. This should be true whether institutions seek to become lead plaintiffs or play a lesser role, because the factors cited by Congress as reasons for encouraging institutions to become lead plaintiffs (e.g., similarity of interests, financial motivation and balanced view) are also likely to be present when they choose another vehicle to pursue those interests.

## AN INSTITUTIONAL PERSPECTIVE

The State of Wisconsin Investment Board ("SWIB") serves as investment manager for the Wisconsin public employee retirement system, which has 390,000 participants and is the fourteenth largest pension fund in the United States.[20] SWIB currently has $40 billion in retirement and other public monies under management.

Over the last five years, SWIB has participated in more than sixty-five securities class action lawsuits and recovered in excess of $15 million in claims. During that time period, SWIB's stake in each of five separate class action settlements was individually more than $750,000. The largest recovery in a single lawsuit was $1.7 million. Over all of the securities class actions, SWIB's average recovery was $230,000. Where it was tracked, SWIB's share of total losses claimed in individual class actions was as high as twenty percent of losses

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16. The Conference Committee's Statement of Managers explicitly states that with institutions as lead plaintiffs, "[C]ourts could be more confident settlements negotiated under the supervision of institutional plaintiffs were 'fair and reasonable' than is the case with settlements negotiated by unsupervised plaintiffs' attorneys." H.R. REP. NO. 369, *supra* note 1, at 35, *reprinted in* 1995 U.S.C.C.A.N. 679, 734. *See also supra* note 10 and accompanying text.

17. *See* Pub. L. No. 104–67, § 101, 1995 U.S.C.C.A.N. (109 Stat.) 737, 739.

18. The Conference Committee's Statement of Managers provides, "Although the most adequate plaintiff provision does not confer any new fiduciary duty on institutional investors—and the courts should not impose such a duty—the Conference Committee nevertheless intends that the lead plaintiff provision will encourage institutional investors to take a more active role in securities class action lawsuits." H.R. REP. NO. 369, *supra* note 1, at 34, *reprinted in* 1995 U.S.C.C.A.N. 679, 733.

19. Section 101 of the Act contains provisions which would permit the presumption that the plaintiff with the largest financial interest can best represent the class to be overcome if that plaintiff would not fairly and adequately protect the interests of the class or would be subject to unique defenses that render it incapable of adequately representing the class. Pub. L. No. 104–67, § 101, 1995 U.S.C.C.A.N. (109 Stat.) 737, 739.

20. *See Top 200 Pension Funds/Sponsors*, PENSIONS & INVESTMENTS, Jan. 22, 1996, at 22.

for the entire class. Other large institutional investors have had similar experiences.[21]

Institutions have been aware of the individual financial interests they have in securities class actions, but it has only been recently that research identified the relatively large stake that institutions in general have in these lawsuits. A 1995 study of securities class action lawsuits first reported that the single largest claimant in these actions, on average, accounts for 13.1% of claims filed. On average, institutional investors with large claims were found to account for about half of allowed losses.[22]

It was with this recent knowledge that institutions (as well as Congress) first began to focus attention on effective mechanisms for empowering the holders of sizeable class claims to pursue their interests. Authors Grundfest and Perino chronicle those efforts in the main article.

## THE FIDUCIARY'S RESPONSE

Institutions are now at a critical juncture, where a new understanding of their financial stake in private securities litigation has been gained and Congress has opened up new avenues for action. However, before considering the roads which institutions could take over this new ground, it is important to focus on the principles which guide pension funds and other institutions in their role as fiduciaries.

The Restatement of Trusts, Second, describes the duty which trustees have to enforce trust asset claims as a fiduciary: "The trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust."[23]

The Comment to the Restatement further describes the considerations which can be taken into account when evaluating a claim:

> It is not the duty of the trustee to bring an action to enforce a claim which is a part of the trust property if it is reasonable not to bring such an action, owing to the probable expense involved in the action or to the probability that the action would be unsuccessful or that if successful the claim would be uncollectible owing to the insolvency of the defendant or otherwise.[24]

These are the issues that must be examined by institutions in deciding what actions to take on a claim held by the estate for which they are fiduciaries. It is a case by case analysis, involving the exercise of reasonable judgment, to

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21. Weiss and Beckerman reported that the 50 largest claimants in their survey of 82 securities class actions had an average loss of $597,000. Weiss & Beckerman, *supra* note 9, at 2089. In 15 of the actions, the average loss of the 50 largest claimants exceeded $1 million. *Id.* The largest single claimant, on average, accounted for 13.1% of the dollar value of claims filed, and they cite actions in which the largest single claimant accounted for as much as 34% of total claims. *Id.* at 2090, tbl. 2. The impact of these findings was also discussed by Grundfest and Perino in the principal article. Grundfest & Perino, *supra* note 2, at 572–73.

22. Weiss and Beckerman reported that institutional investors among the top 50 claimants accounted for an average of 46% of all allowed losses. Weiss & Beckerman, *supra* note 9, at 2089 n.197. Furthermore, they go on to explain that the data being analyzed most likely understated the size of institutional claims. *Id.* at 2089.

23. RESTATEMENT (SECOND) OF TRUSTS § 177 (1959).

24. *Id.* § 177 cmt. c.

evaluate the likelihood of success in bringing a claim and the anticipated costs involved.[25]

Given the ambiguities involved in weighing the factors involved in this fiduciary standard, it is easy to see that different fiduciaries can reach different (but reasonable) conclusions in balancing the likelihood of success on a securities claim with the associated costs. This is particularly likely to be so until the impact of changes made by the Act in private securities litigation can be better ascertained.

## WHAT WILL INSTITUTIONS DO?

Only one thing is certain at this point; there will likely be a broad array of reasonable responses taken by institutions in securities class actions over the near term. Some may ultimately prove to be successful and cost-effective. Other efforts may fail. Indeed, different institutions may have different costs to take into consideration and end up taking inconsistent but reasonable courses of action on the same claim.[26]

Authors Grundfest and Perino argue that the Act could actually prove detrimental to the involvement of institutions in private securities litigation because of the uncertainty and added costs it will bring to the area. This could be true over the short run. However, Congress might have been taking a longer-term view. Only time will tell whether Congress' attempt to deploy institutions in securities class action lawsuits will produce the advertised results or fall short.

Since institutional investors have begun to focus their collective attention on securities class actions, there have been three main themes around which concerns have clustered: (1) improving plaintiff recoveries in meritorious lawsuits; (2) increasing efficiency of the system and eliminating unnecessary costs and actions; and (3) deterring fraud and other wrongdoing. These will undoubtedly continue to be themes for future institutional investor involvement in securities class actions. However, methods for achieving these goals will

25. As an example, under the old system, institutional investors like SWIB rarely received notice of the pendency of a class action until a settlement had already been reached and had been submitted to the court for approval. In such circumstances, most institutions determined that the costs involved (in terms of legal fees and lost productivity of staff who would be required to participate in the effort and be subjected to discovery) in fighting both the defendant and class counsel to overturn a negotiated settlement which would fully resolve a complex case on the court's docket far outweighed the expected benefits of such an endeavor. However, under the new system created by the Act, the cost benefit balance could be substantially modified if the courts are receptive to institutional involvement or if institutions are able to identify at the onset those cases in which they have large claims.

26. For example, some fiduciaries with broad equity holdings might, in conducting an analysis of the costs and benefits of pursuing a particular course of action (or inaction), balance costs or benefits on long-term value of their total portfolio with the costs or benefits in the single case. Some fiduciaries with smaller portfolios or a shorter investment horizon might reasonably conclude they have little or no long-term or quantifiable broader fiduciary interests to consider. Grundfest and Perino discuss the impact that efficiencies resulting from collective action can have on the outcome of this analysis. Grundfest & Perino, *supra* note 2, at 563–77. However, as to institutions that seek lead plaintiff status in a particular lawsuit, it seems unlikely that generalized portfolio factors would be significant in comparison to the substantial stake which the institution would likely have in that particular class action as the plaintiff with the largest financial interest.

probably evolve as institutions gain experience and the new law in this area is given more clarity.

Grundfest and Perino discuss a number of the options for action that have been identified by institutional investors participating in the Stanford Institutional Investor Forum.[27] They focus on collective institutional efforts that use low cost strategies which take into consideration the added time commitment, potential discovery demands and other potential liabilities associated with greater activism.

However, in addition to the low-cost letter writing and other strategies described by Grundfest and Perino, institutional investors could consider additional methods for asserting their rights in securities class actions. Some of these suggestions would apply generally to involvement in all securities class action lawsuits, while others would be of more limited usefulness where particular facts make them cost-effective.

## COMPETITIVE SELECTION OF COUNSEL

Whether serving as lead plaintiff, working with another class member who is serving as lead plaintiff, or petitioning the court as a member of the plaintiff class under Rule 23, selection of counsel and negotiation of fees are sure to be areas of concern to large claimants. Clients have effectively used competitive counsel selection methods as a means of controlling costs in many other forums.

Competitive selection of counsel does not mean choosing the lowest bidder. Instead, it refers to a comparative evaluation of competent counsel, perhaps from a list of firms that are invited to make proposals. In many instances, the same type of process will be used by the company to select defense counsel.

Some institutions might also be willing to experiment with fee arrangements, in order to maximize alignment of counsel's interests with those of the class. For example, consideration might be given to soliciting proposals that combine hourly fees with contingency fee caps or using an early settlement bonus to overcome disincentives to resolve cases early. Development of litigation budgets and provision for regular reporting to lead plaintiff or a plaintiffs' committee could be incorporated into retention agreements. Liability for Rule 11 sanctions under the Act[28] and arrangements for covering litigation costs could also be points of negotiation during the counsel selection process.

In addition, limited intervention under Rule 23 could be appropriate where a class member seeks to have input on selection of counsel, dissemination of information to class members or another specific issue. End of the case challenges to class counsel fees through letters to the judge or appearances at the settlement hearing will also likely continue to be an option pursued by

27. In the principal article, Grundfest and Perino discuss several options for collective shareholder action, including writing letters to class counsel where claims are considered frivolous or fees too high, asking judges to require competitive selection of counsel, and opting out (or threatening to do so) where settlements are inadequate. *Id.* at 581.

28. Section 101 of the Act provides for mandatory review by the court and imposition of cost sanctions for filing frivolous pleadings and motions. Pub. L. No. 104–67, § 101, 1995 U.S.C.C.A.N. (109 Stat.) 737, 741–42.

shareholders in lawsuits where competitive selection of counsel was not used or where there was no meaningful lead plaintiff control.

## ADDRESSING DILATORY DEFENSE TACTICS

In instances where plaintiff class members continue to hold significant positions of a defendant company's stock, institutions might consider combining corporate governance actions with pursuit of the class claims. This approach could prove fruitful where the defendant appears to be wasting corporate assets or protecting culpable officers or directors. For example, shareholders could seek to replace recalcitrant directors. Requests for Rule 11 sanctions might also be sought as a way to address dilatory defense tactics.

## MAXIMIZING DETERRENCE

As broad holders of the stock of corporate America, institutions can appreciate the benefits which accrue to all shareholders from structuring settlements so as to impose personal losses on culpable parties. Interjection of personal responsibility into the settlement process on a regular basis could prove to be of great long-term benefit to shareholders. However, this is one area in particular where the broader perspective of institutional investors could be critical for achieving the goal of deterrence without discouraging qualified directors from serving on corporate boards.

Inclusion of company corporate governance changes in settlements could also serve to deter future wrongdoing. For example, institutions could seek settlements which provide for addition of independent directors to improve board oversight capabilities or modify company compensation policies to more closely align the interests of shareholders and management.

## COORDINATION OF EFFORTS

Section 101 of the Act permits the court to appoint as lead plaintiff the member *or members* of the plaintiff class that are most capable of adequately representing the interests of the class. Many institutions are likely to be more willing to serve as lead plaintiff or participate in monitoring a class action if done as part of a committee of plaintiffs. This model of cooperative effort has been central to previous efforts undertaken by institutional investors in corporate governance matters and other areas.[29] It not only provides individual participants with a greater degree of comfort that their fiduciary analysis is reasonable, but also may be the most practical method for addressing divergent interests amongst class members without incurring the inefficiencies of creating subclasses in the litigation.

For example, where there is a tension between the interests of class members who have sold their stock in the defendant and class members who continue to hold the stock, use of a committee with members from both groups

29. For instance, the Stanford Institutional Investor Forum discussed by authors Grundfest and Perino has attributed much of its success to the cooperative efforts of participating institutions. Grundfest & Perino, *supra* note 2, at 577–82. The Council of Institutional Investors has also served as a vehicle for facilitating institutional cooperation on corporate governance matters.

could provide an efficient means for accommodating both sets of interests in monitoring the case and structuring a fair settlement.

## ALTERNATIVE DISPUTE RESOLUTION

Arbitration, mediation, mini-trials and similar alternatives could be attempted in situations where they would provide an efficient mechanism for resolving an action or an issue in an action more quickly or at a lower cost. These alternatives might also become popular as a means of avoiding sanctions if courts begin to enforce Rule 11 as contemplated by Congress.

## OPTING OUT/OBJECTING TO SETTLEMENTS OR FEES

As noted by authors Grundfest and Perino, opting out of the settlement could be a financially prudent action where an institutional investor has a large stake and is not satisfied with how an action has been pursued. This will continue to be an option, even when a lead plaintiff has been appointed.

In addition, any member of the class may appear at the settlement hearing to object to the proposed settlement or fee award. Institutional investors could make use of this right to actively participate in the court's review of a proposed settlement or fee award without taking on the burdens of becoming a lead plaintiff.

## INCREASED INFORMATION FLOW

While the Act provides for improved notices to members of the plaintiff class, particularly as to settlements,[30] institutional investors might find it to be in the best interests of the class to provide an earlier or greater flow of information to some or all of the class on matters of importance to them. For example, class members (or a sample thereof) could be provided with the opportunity to select between varying settlement structures or options during the course of negotiations.

Individual class members might also file a notice of appearance under Rule 23 and ask to be provided with copies of all court filings in order to stay on top of developments in the case.

## SERVING AS LEAD PLAINTIFF

Some institutions will undoubtedly seek to be appointed as lead plaintiff in situations where the institutional investor has a substantial claim in the context of its portfolio and it has one of the largest financial interests in the relief sought for the class. As authors Grundfest and Perino point out, this appears to be a high cost option and could expose the institution to burdensome discovery and lawsuit monitoring demands. However, if the courts implement Congress' intent as expressed by the Conference Committee's Statement of Managers and discussed above,[31] institutions will begin to evaluate the benefits

30. Section 101 of the Act requires that settlement notices include an explanation of the reasons for the settlement, a description of attorneys' fees and costs being sought, and a statement on the amount of recoverable damages per share or statement about damages from each settling party if there is disagreement. Pub. L. No. 104–67, § 101, 1995 U.S.C.C.A.N. (109 Stat.) 737, 737–49.

31. *See supra* note 18 and accompanying text.

of becoming lead plaintiff as outweighing associated costs and regularly step forward as contemplated by the Act.

## CONCLUSION

It will take time to determine whether Congress' efforts to deploy institutional investors in securities class actions will "ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions."[32] Changes brought about by the Act will certainly be evolutionary rather than revolutionary. However, in the end it seems that the key to increased future institutional involvement in private securities litigation is held, not by the institutions themselves, but by the federal judiciary. It is the courts that will primarily determine whether the end product of the Act will be a fairer and more efficient private securities litigation system or a request for further legislative overhaul of the system sometime in the twenty-first century.

32. H.R. REP. NO. 369, *supra* note 1, at 34, *reprinted in* 1995 U.S.C.C.A.N. 679, 733.