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APPOINTMENT OF LEAD PLAINTIFF AND LEAD COUNSEL UNDER THE PRIVATE
SECURITIES LITIGATION REFORM ACT OF 1995

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-----Footnotes-----

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-----End Footnotes-----

TEXT:

Three major issues arising after passage of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 U.S.C. 78u-4(a), are discussed in this paper. First, the topic of appointing lead plaintiff is addressed through a compilation of cases on the issue. The majority of courts addressing the appointment of lead plaintiff have allowed the appointment of several unrelated parties to aggregate as a group to be named lead plaintiffs. This general consensus, however, has become significantly eroded recently as a number of courts have moved toward the appointment of a smaller subgroup of individuals who have a link to each other besides purchasing defendants' stock and retaining the same counsel. Notably as well, some courts have narrowed the field even further by deciding not to allow the aggregation of individuals whatsoever in favor of the appointment of the institution or individual investor with the largest financial loss.

The second topic discussed here is defendants' standing to object to the appointment of lead plaintiff and/or lead counsel. This issue, as well as the issue of appointing lead plaintiff, is illustrative of the struggle the courts are facing in interpreting the PSLRA. The vast majority of courts have held that a defendant may not object to the proposed lead plaintiff appointment but may raise objections to adequacy or typicality at the class certification stage of the litigation. Two courts, however, have permitted defendants to object at the onset of the litigation.

The third topic of this paper is the appointment of lead counsel under the PSLRA. The PSLRA grants the lead plaintiff the "power" to select lead counsel. While the majority of the cases suggest that a plaintiff has this right (subject to the court's approval), in a limited line of cases, the courts are taking a more active role through a bidding process. These recent holdings interpreting the PSLRA suggest that by selecting lead counsel via the bidding process, plaintiffs' counsel not even initially involved in the litigation may ultimately be appointed lead counsel. See William F. Alderman, Recent Developments in the Lead Plaintiff/Lead Counsel Wars, Sec. Reform Act Litig. Rep., Vol. 8, No. 5, at 663. The effect of the lead plaintiff selection may also ironically result in increased litigation, as "disappointed candidates for the lead role may actively encourage their clients and other investors to opt out of the class action to pursue separate individual or mass actions." *Id.* at 663.

I. LEAD PLAINTIFF ISSUES UNDER THE PSLRA

A. Background

The PSLRA creates a presumption that the most adequate plaintiff is "the person, or group of persons that: (aa) has either filed the complaint or made a motion for lead plaintiff in response to a notice under subparagraph (A)(1); (bb) . . . has the largest financial interest in the relief sought by the class; and (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(B)(iii)(I). This presumption is rebuttable only if a member of the class can prove that the "presumptively most adequate plaintiff" will not fairly and adequately protect the interests of the class as a whole, or would be subject to unique defenses. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)-(II).

The United States Securities and Exchange Commission ("SEC") does not provide guidelines to assist the judiciary in interpreting "group of persons" as stated in the PSLRA. Rather, the SEC has suggested that a court should "only approve a group that is small enough to be capable of effectively managing the litigation and the lawyers." In re Baan Co. Sec. Litig., 186 F.R.D. 214, 216 (D.D.C. 1999); see also In re Oxford Health Plans, Inc. Sec. Litig., 182 F.R.D. 42, 48-49 (S.D.N.Y. 1998). The SEC has recommended that no more than three to five persons serve as lead plaintiffs in order to ensure joint decisionmaking, and to manage the litigation effectively. See Baan, 186 F.R.D. at 219 (Memorandum of the Securities and Exchange Commission, Amicus Curiae). See also

In re Network Assocs., Inc., Sec. Litig., 76 F.Supp. 2d 1017 (N.D. Cal. 1999).

1. Aggregation Of A Small Group With The Largest Financial Stake Is Permitted

The "majority of courts addressing this issue [of appointing lead plaintiff] have permitted the aggregation of claims by unrelated parties." Yousefi v. Lockheed Martin Corp., 70 F. Supp. 2d 1061,

1067 (C.D. Cal. 1999) (an individual investor and City of Philadelphia's pension plan were appointed co-lead plaintiffs as they suffered the largest financial loss (over a proposed 137-member lead plaintiff group)); see also In re First Union Corp. Sec. Litig., No. 3:99-CV-237, 2000 U.S. Dist. LEXIS 2267, at *12 (W.D.N.C. Jan. 27, 2000) ("there is now an overwhelming weight of authority allowing the appointment of such an unrelated group to serve as lead plaintiffs").

. Zuckerman v. Foxmeyer Health Corp., No. 3:96-CV-2258, 1997 U.S. Dist. LEXIS 23549, at *9-10 (N.D. Tex. Mar. 28, 1997): Eleven individual plaintiffs with the largest financial interest were collectively appointed lead plaintiff, as a result of the plaintiffs' petitioning the court jointly.

. Gluck v. CellStar Corp., 976 F. Supp. 542, 546 (N.D. Tex. 1997) ("Aggregating the shares of several plaintiffs for purposes of [the largest financial interest] calculation is proper under the statutory language . . .").

. Reiger v. Altris Software, Inc., No. 98cv0528, 1998 U.S. Dist. LEXIS 14705 (S.D. Cal. Sept. 11, 1998): The court approved as lead plaintiff the Reiger Group, a group comprised of smaller investors (including: individual investors, an institution, and a pension plan), over another group which included one of the largest institutional investors in the defendant's stock. The court looked to the plain meaning of the statute and rationalized that the Reiger Group was the group of persons that had the largest financial interest in the relief sought by the class. "Congress made [it] clear that a court can consider the aggregate group's losses in determining which group has the largest financial interest." *Id.* at *13. The court rejected the argument that since the single largest loss was contained in the alternative group, they should be appointed lead plaintiff. *Id.* The court stated that while the legislative history of the PSLRA mentions the "goal of increasing the involvement of institutional investors in securities litigation, there is no express provision in the Act limiting the rebuttable presumption to institutional investors." *Id.* at *14. Three law firms requested by the Reiger Group to serve as co-lead counsel were appointed by the court.

. In re Advanced Tissue Sciences Sec. Litig., 184 F.R.D. 346 (S.D. Cal. 1998): The court refused to

appoint a group of 250 unrelated, individual investors and another group of 165 class members. The court stated that aggregation is only feasible for small groups of individuals, and therefore, appointed a group of six plaintiffs. The courts "that have aggregated financial losses for the purpose of designating the lead plaintiff have tended to confine their appointments of lead plaintiff to small groups of individuals." [Id. at 352.](#) See also [Zuckerman, 1997 U.S. Dist. LEXIS 23549](#), at *10 (where the court appointed eleven individual plaintiffs with the largest financial interest). The Advanced Tissue court however, criticized the strict approach set forth in [In re Donnkenney, Inc. Sec. Litig., 171 F.R.D. 156, 158 \(S.D.N.Y. 1997\)](#), and held that a "case-by-case" and "a rule of reason" approach should be applied. [Advanced Tissue, 184 F.R.D. at 352.](#)

. [In re Baan Co. Sec. Litig., 186 F.R.D. 214, 218 \(D.D.C. 1999\)](#): The court declined to designate as "lead plaintiff" a 20-member subgroup of 466 investors. The court rationalized that the group was comprised of a majority of small investors, and it would be likely that lead counsel would have a greater financial stake in the litigation than the individual plaintiffs. Yet the Baan court, like the Advanced Tissue court, rejected the holding in [Donnkenny, 171 F.R.D. 156 \(S.D.N.Y. 1997\)](#), and refused to adopt the strict guideline that unrelated individuals may never be aggregated. The Baan court stated that lead plaintiff decisions should be made with three plaintiffs being the initial target, with five or six being the upper limit. See [Baan, 186 F.R.D. at 216-17](#) (agreeing with the SEC's position).

. [Takeda v. Turbodyne Techs., Inc., 67 F. Supp. 2d 1129 \(C.D. Cal. 1999\)](#): Six individual investors and one institution, with the largest losses, moved as a collective party and were successful in being named lead plaintiff. See [id. at 1131](#). This group was selected over another group of several hundred investors, as the court indicated the "congressional preference was for large, institutional investors." [Id. at 1136.](#)

2. Limitations On Aggregating Shareholders

Some courts have suggested that while aggregation should be allowed, there are certain instances where the number of proposed lead plaintiffs should be limited.

. [Lubitsch v. Dataworks Corp., No. 98-2012-IEG \(S.D. Cal. Feb. 9, 1999\)](#): The court rejected the appointment of a 25-member lead plaintiff group, and appointed a 3-member subgroup.

. [Mitchell v. Complete Management, No. 99 Civ. 1454, 1999 U.S. Dist. LEXIS 14460 \(S.D.N.Y. Sept. 15, 1999\)](#): The court directed the plaintiff group to propose a lesser number of class members for appointment of lead plaintiff, as the initial proposal was for a 141 lead-plaintiff group.

. [Wenderhold v. Cylink Corp., 188 F.R.D. 577 \(N.D. Cal. 1999\)](#): While the court did not allow aggregation in this instance, it recognized that there are two instances where aggregation is necessary: (i) where it is necessary to address the existence of intra-class periods; or (ii) if it would guarantee effective control of counsel. [Id. at 586.](#)

. [Switzenbaum v. Orbital Sciences Corp., 187 F.R.D. 246 \(E.D. Va. 1999\)](#): The Court appointed a group of five institutional investors, even though another group of individuals had larger financial losses. The court noted that this was to be an exception, however, as the "larger" group did not provide the court with any meaningful information about the identity of its members. See [id. at 251.](#) This "larger" group was "unable to agree on who its members actually were," and provided the court with only a simple "mathematical conclusion" that they collectively suffered the greatest loss. *Id.*

. [Greenberg v. Bear Stearns & Co., 80 F. Supp. 2d 65 \(E.D.N.Y. 2000\)](#): The court refused to appoint a sub-class as the lead plaintiff where the lead plaintiffs in the broader litigation had already been appointed. The fact that the moving sub-class party had the greatest financial interest was essentially irrelevant.

C. Aggregation Of Shareholders Not Permitted Under the PSLRA

A minority of the courts have stated that aggregation of unrelated parties should never be allowed when determining lead plaintiff in a securities class action. These courts focus on a strict interpretation of the PSLRA, and have held that unrelated individuals cannot classify as a "group of persons." This concept, however, appears to be a recently growing trend among the courts.

. [In re Donnkenny Inc. Sec. Litig., 171 F.R.D. 156, 157 \(S.D.N.Y. 1997\)](#): The court refused to appoint a lead plaintiff group comprised of two unrelated institutional investors and four other

individual class members even though all other plaintiffs agreed to such arrangement. In concluding that unrelated individuals cannot be a "group of persons," the court boldly stated that "to allow aggregation of unrelated plaintiffs to serve as lead plaintiffs defeats the purpose of choosing a lead plaintiff." [Id. at 157](#). Instead the court appointed the one group of "related" plaintiffs with the largest financial interest, which consisted of a limited partnership and three individual investors. The court further stated it is better to have one institutional plaintiff (with expertise in the financial market) control the litigation. [Id. at 158](#).

. [In re McKesson HBOC Sec. Litig., No. 99-20743, 1999 U.S. Dist. LEXIS 20767](#) (N.D. Cal. Nov. 2, 1999): The court concluded that a lead plaintiff must be an individual person or entity, or at most, a close-knit group of persons. [Id. at *21-23](#). The court, while appointing a single institutional investor, stated that amorphous, aggregated plaintiff groups should not be allowed. [Id. at *3](#). A similar holding in [Network Assocs., 76 F. Supp. 2d 1017 \(N.D. Cal. 1999\)](#), discussed below, suggests that the Northern District of California will not allow aggregation in securities litigation.

. [Sakhrani v. Brightpoint, Inc., 78 F. Supp. 2d 845 \(S.D. Ind. 1999\)](#): The court stated that in most instances the appointment of an "artificial group" as lead plaintiffs will undermine the goals of the PSLRA. See [id. at 853](#). "Such an appointment may be entirely appropriate where the group consists of investors who have prior relationships independent of the lawsuit, such as family members who manage investments jointly, or affiliated pension funds or mutual funds under common management." [Id. at 847](#).

. [In re Telxon Corp. Sec. Litig., 67 F. Supp. 2d 803, 813 \(N.D. Ohio 1999\)](#): The court utilized a strict approach to interpreting the term "group," as it refused to appoint a group of 18 individual unrelated investors as lead plaintiff - even though they had suffered the greatest loss in aggregate. Instead, the court opted for a representative 3-person group consisting of 2 brothers and an unrelated stockbroker whose damages were approximately \$ 2 million less than the other group. The court was concerned that the unrelated group was too "diverse in nature" and would not function as a unified whole. See [id. at 809](#). The court also held that an "assemblage" of investors whose members are unrelated to one another in any way other than the fact that they suffered similar financial losses by purchasing the defendant's stock are not entitled to lead plaintiff status. The court stated that such a random assortment of persons was not a "group" within the meaning of the PSLRA's lead plaintiff provisions. [Id. at 813](#). The court voiced concern that if such a group were allowed, it would be a group in "name only," and the members would be unbound by any allegiance to one another. [Id.](#)

. [Tumolo v. Cymer, Inc., \[1999 Transfer Binder\] Fed. Sec. L. Rep. \(CCH\) P90,453, at 92,099](#) (S.D. Cal. Jan. 22, 1999): The district court rejected all motions to appoint a lead plaintiff. The proposal for a 339-member plaintiff group, and the alternative proposal for a seven-member group with the largest losses, were both rejected. The court suggested that only a very large investor would be an adequate class representative.

. [In re Network Assocs., Inc. Sec. Litig., 76 F. Supp. 2d 1017 \(N.D. Cal. 1999\)](#): The court prohibited the aggregation of unrelated plaintiffs and criticized the proposed aggregation as follows: "The only thing the investors in any group have in common ... is the lawyer. They have no link to each other. They are not organized with any group decisionmaking apparatus. They attended no organizing meetings. They have no cohesive identity." [Id. at 1022.](#)

The SEC has submitted an amicus curiae brief to the Ninth Circuit Court of Appeals in *Network Assocs.*, noting that "this may be the first court of appeals decision to address the lead plaintiff provisions." Brief of SEC as Amicus Curiae, In re Raymond Moore, No. 00-70006, at 1 (9th Cir. Feb. 29, 2000). The Ninth Circuit agreed to review the U.S. District Judge William Alsup's novel decision to appoint as lead plaintiff a small-time investor who lost relatively little compared to several other plaintiffs, including two institutional investors alleging millions in losses. Judge Alsup also ordered the lead plaintiff to put the lead counsel position out to bid, rather than allow the individual to select his own counsel. See

[Network Assocs., 76 F. Supp. 2d at 1030-31.](#) D. The Number Of Lead Plaintiffs Appointed Under The PSLRA

1. Limiting The Size Of The Lead Plaintiff Group May Be Inappropriate

It appears that at least one district will not allow an *arbitrary limit* on the number of proposed lead plaintiffs.

. [D'Hondt v. Digi Int'l Inc., No. CIV 97-5, 1997 U.S. Dist. LEXIS 17700](#) (D. Minn. Apr. 2, 1997): The court approved appointment of 21 individuals as lead plaintiff. The court stated that "when, as here, the putative class may total in the hundreds of thousands, if not millions, an arbitrary limit on the number of proposed Lead Plaintiffs would be unrealistic, if not wholly counterproductive." *Id.* at *13.

. [Chill v. Green Tree Fin. Corp., 181 F.R.D. 398, 409 \(D. Minn. 1998\)](#), dismissed on other grounds, sub nom., by, [61 F. Supp. 2d 860 \(D. Minn.](#)

[1999](#)): The court ultimately appointed a six-person "smaller subset" of a larger 300-person proposed lead plaintiff group. The court stated, however, that the PSLRA does not "warrant[] an arbitrary limit on the number of proposed lead plaintiffs," thus suggesting that limiting the number of lead plaintiffs *may* be inappropriate. *Id.* at 409 (referring to the court's holding in *D'Hondt*).

2. Appointing Co-Lead Plaintiffs Is Permitted Under The PSLRA

A few courts have allowed multiple plaintiffs with each taking an active role as "co-lead," even though this appointment is contrary to the SEC's position.

. [In re Oxford Health Plans, Inc. Sec. Litig., 182 F.R.D. 42 \(S.D.N.Y. 1998\)](#): The court appointed three groups of investors as joint-lead plaintiffs, with each group exercising a sizeable equal vote. The three groups of investors consisted of: (1) an institution, The Public Employee's Retirement Association of Colorado ("CoIPERA"); (2) three individual investors; and (3) a management company which included five pension funds. See [id. at 44-45](#). The Oxford court rationalized that all were qualified to represent the class, as each had suffered approximately two to three million dollars in losses. The court further reasoned that multiple lead plaintiffs allows for "broad representation." [Id. at 49](#).

The lead plaintiff appointment in Oxford was directly contrary to the SEC's position set forth in the SEC's amicus curiae memorandum submitted therein arguing that co-lead plaintiffs should not be appointed. The SEC argued that while aggregation has been allowed there is no precedent in case law for such an arrangement. [Id. at 48-49](#). The SEC further argued that the appointment of co-lead plaintiffs limits the ability of those plaintiffs "to control the litigation, and in particular control the conduct of the lawyers." [Id. at 49](#). The Oxford court did not understand how the appointment of more than one lead plaintiff would limit the ability to control the litigation, and conversely rationalized that a greater number of plaintiffs would allow the collective group to "wield more control over counsel." *Id.*

. [In re Party City Sec. Litig., 189 F.R.D. 91 \(D.N.J. 1999\)](#): Referring to Oxford, the Party City court appointed two co-lead plaintiffs (one institutional

investor, and one individual investor), and reasoned that "the fact that a group, as opposed to a single individual, is proposed as lead plaintiff does not necessarily render the Proposed Lead Plaintiffs inadequate." [Id. at 112](#). An additional plaintiff was not allowed to be part of the aggregated group because the Party City court believed their interests were not in accord with the appointed lead plaintiffs. See [id. at 111](#).

. [Gluck v. CellStar Corp., 976 F. Supp. 542 \(N.D. Tex. 1997\)](#): The court refused to appoint co-lead plaintiffs, as the "interest of one institutional investor in the litigation far exceeded the interests of the other purported plaintiffs." [Id. at 550](#). The court did recognize however, that appointing co-lead plaintiffs may be appropriate in some situations. The court explained that where two institutional investors have roughly equal economic losses co-lead plaintiffs may be appropriate. [Id. at 549-50](#). The court also stated that co-lead status should possibly be allowed where two or more smaller investors have roughly equal economic interests and neither has a significantly larger interest over the other. [Id. at 550](#).

. [In re Cephalon Sec. Litig., 1998 U.S. Dist. LEXIS 12321](#), at *15-16 (E.D. Pa. Aug. 12, 1998): The court allowed two groups of plaintiffs to be appointed co-lead plaintiffs as they had the largest financial interest in the relief. One group was comprised of an institutional investor and a technical trader (individual), while the other group consisted of an individual.

3. Appointing Co-Lead Plaintiffs Is Not Allowed Under The PSLRA

One court faced with the issue of whether to appoint more than one lead plaintiff has refused to appoint co-lead plaintiffs.

. [Laperriere v. Vesta Ins. Group, Inc., No. 98-AR-1407 \(N.D. Ala. Oct. 19, 1998\)](#): In appointing lead plaintiff, the court refused to decide between a group of individual investors (first five, and then, nine), and an institution (The Florida State Board of Administration). Noting that the "SEC had filed an excellent memorandum brief on the side of the so-called Florida Group," the court deemed each party as "more than adequate" to represent the class as a whole. The judge instead used the unconventional method of a "coin-toss" to determine the lead plaintiff. The court labeled the

court's holding in Oxford as "unsatisfactory."

Following the Court's order, the competing groups reached an agreement concerning the appointment of lead plaintiff and lead counsel. That stipulation was approved by the Court and the "coin-toss" proved unnecessary.

II. DEFENDANTS' STANDING TO OBJECT TO THE LEAD PLAINTIFF APPOINTMENT

The courts have split on the issue of defendants' standing to object to the lead plaintiff appointment, although it appears the majority of the courts have concluded that defendants do not have standing to object.

A. Defendants Lack Standing to Object To The Lead Plaintiff Appointment

. [Takeda v. Turbodyne Techs, Inc., 67 F. Supp. 2d 1129 \(C.D. Cal. 1999\)](#): The court noted that the PSLRA language expressly states that only a purported class member may challenge the adequacy of the proposed lead plaintiff. The defendants therefore lack standing to object to the adequacy or typicality of the proposed lead plaintiff at the preliminary stage. [Id. at 1138](#) (citing [Gluck, 976 F. Supp. at 550](#); [Zuckerman, 1997 U.S. Dist. LEXIS 23549](#), at *7-8). "Nevertheless, the court may *sua sponte* raise and address certain of the concerns addressed in defendants' statement." [Takeda, 67 F. Supp. 2d at 1138](#).

. [Greebel v. FTP Software, 939 F. Supp. 57 \(D. Mass. 1996\)](#): The defendant may not object to the adequacy of the proposed lead plaintiff at the initial stages of litigation. [Id. at 60-61](#). The selection of the "most adequate plaintiff," however, does not prejudice the right of a defendant to challenge the adequacy at the class certification stage. *Id.* See also [Wenderhold, 188 F.R.D. at 584](#) (referring to the Greebel court's determination that the PSLRA limits the right to challenge a proposed lead plaintiff to other class members only); [D'Hondt, 1997 U.S. Dist. LEXIS 17700](#), at *11 n.6 (defendants recognized that they did not have standing to object to the adequacy of the lead plaintiffs that had been proposed); [Party City, 189 F.R.D. at 106](#) (where the court stated that both the corporation and/or the individual defendants could contest the lead

plaintiff selection at the class certification stage).

. Other courts have similarly held that defendants do not have standing to object at the preliminary stage of the litigation. See [Gluck, 976 F. Supp. at 550](#) ("the statute is clear that only potential plaintiffs may be heard regarding appointment of lead plaintiff"); [Zuckerman, 1997 U.S. Dist. LEXIS 23549](#), at **7-8 (the defendant may not object to adequacy of the proposed lead plaintiff at the initial stages); *Fishler v. Amsouth Bancorporation*, No. 96-1567-CIV-T-17A, [1997 U.S. Dist. LEXIS 2875](#), at *6 (M.D. Fla. Feb. 6, 1997) ("only members of the plaintiff class may offer evidence to rebut the presumption in favor of the most adequate plaintiff").

B. Defendants Have Standing To Object To The Lead Plaintiff Appointment

. [King v. Livent, Inc., 36 F. Supp. 2d 187 \(S.D.N.Y. 1999\)](#): The court determined that defendants generally do have standing to object, especially where there are no competing plaintiffs as "on balance, a therapeutic appointment process such as is envisaged by the [Reform Act] will work better with more information than less." [Id. at 191](#); see also *Howard Gunty Profit Sharing v. Quantum Corp.*, No. 96-20711, *slip. op.* at 6 (N.D. Cal. Feb. 6, 1997) ("when . . . there are no other potential lead plaintiffs to challenge a moving party, the Court must rely on the defendants to insure that the requirements of [the Act] are satisfied").

III. LEAD COUNSEL ISSUES UNDER THE PSLRA

A. Background

The lead plaintiff appointed by the court has the power, "subject to approval of the court, [to] select and retain counsel to represent the class." [15 U.S.C. § 78u-4\(a\)\(3\)\(B\)\(v\)](#). The lead plaintiff, however, "owes a fiduciary duty to obtain the highest quality representation at the lowest price." [Network Assocs., 76 F. Supp. at 1033](#). The PSLRA does not expressly prohibit the lead plaintiff from selecting more than one firm to represent the class. See [In re Milestone Scientific Sec. Litig., 187 F.R.D. 165, 176 \(D.N.J. 1999\)](#).

The SEC has stated however, that it is of critical importance for a court to inquire into the "appropriateness of multiple counsel"

when proposed. See [Baan, 186 F.R.D. at 232-233](#). The SEC recognized that a single firm may lack the appropriate resources to handle a case of such magnitude, but warned that several other factors must be taken into consideration. The greater the number of class counsel, the greater the likelihood that counsel will manage the litigation, and the plaintiffs will subsequently have more difficulty in supervising the lawyers. The court should also consider the nature of the litigation, the firm's resources and expertise, the circumstances under which the group was formed, and any potential conflicts of interest. *Id.*

B. Auction Method of Appointing Lead Counsel

The auction method of selecting lead counsel in a securities class action was established by District Judge Vaughn Walker in [In re Oracle Sec. Litig., 131 F.R.D. 688, 690-91 \(N.D. Cal. 1990\)](#). Many courts have utilized this method as a way to establish reasonable attorney's fees through marketplace (or adversarial) competition.

. [In re Wells Fargo Sec. Litig., 156 F.R.D. 223 \(N.D. Cal. 1994\)](#): The court, in referring to Oracle, instituted the auction method. The prospective firms were directed to submit proposals to the court by a deadline, which were to include: (i) the firm's experience and bona fide qualifications in securities class action litigation; (ii) each attorney's experience who would be involved in the litigation; (iii) the firm's insurance coverage for malpractice; (iv) the percentage of recovery the firm would charge; (v) the terms under which the fees would be charged; and (vi) a certification that the proposal was prepared independently of any other firm. Wells Fargo, at 228-29. Class counsel would then be determined by looking at a combination of these monetary and nonmonetary factors. See [id. at 229](#). Two firms were not allowed to submit a joint bid, as the court stated that class counsel should be selected competitively. [Id. at 227](#); see also [In re California Micro Devices Sec. Litig., No. C-94-2817-VRW, 1995 U.S. Dist. LEXIS 11587, at *14 \(Aug. 4, 1995\)](#) (stating that the competitive bidding process should be utilized to guarantee that the interests of the class are "fairly and adequately protected").

. [In re Cendant Corp. Litig., 182 F.R.D. 144 \(D.N.J. 1998\)](#): The court conducted an auction to "determine the lowest qualified bidder to represent the class as counsel." [Id. at 151](#).

. [Sherleigh Assocs. LLC v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688 \(S.D. Fla. 1999\)](#): The court accepted the bidding process for price and quality of representation. The court also believed that a contingency basis fee arrangement, as explained in [In re Cendant, 182 F.R.D. at 150-51](#), would best align the interests of the class with those of the attorneys.

. [Wenderhold v. Cylink Corp., 188 F.R.D. 577 \(N.D. Cal. 1999\)](#): Judge Walker, in determining that the bidding method would be used, attached copies of the fee schedules submitted by both firms in an effort to provide substantial public disclosure. [Id. at 588](#). Judge Walker disclosed each bidder's proposal to the other, and then invited both to participate in a hearing before making his final determination.

C. Establishing An Executive Committee of Multiple Lead Counsel

The concept of an executive committee was stated in [Oxford, 182 F.R.D. at 51](#), where three-lead counsel were appointed to co-chair a committee to oversee the litigation. The function of the committee was to "allocate in the most convenient and economic fashion, the non-strategic work arising from this litigation." [Id. at 50](#). The majority of courts however, appear to be reluctant to appoint an executive committee of multiple lead counsel.

. [Sherleigh Assoc. LLC v. Windmere-Durable Holdings, Inc., 184 F.R.D. 688 \(S.D. Fla. 1999\)](#): The court instituted the bidding process rather than appoint an executive committee. The court rationalized that the "proposed representation of a consortium of ten law firms [was] not in the best interests of the class members." [Id. at 692](#).

. [In re Milestone Scientific Sec. Litig., 183 F.R.D. 404, 418 \(D.N.J. 1998\)](#): The court stated that "litigation by committee" may be unnecessary and wasteful, as there is a potential for duplicate services and attorney fees. "Because the appointment of committees of counsel can lead to substantially increased costs, they should not be made unless needed; a need is most likely to exist in cases in which the interests and positions of group members are sufficiently dissimilar to justify giving them representation in decision making." [Id. at 418](#).

D. Notice To Brokers Concerning The Filing Of A New Action

A recent trend among some plaintiffs counsel has been to solicit clients by mailing notices and certification forms to brokers requesting that the brokers forward such information to their clients concerning the recent filing of a securities class action. Numerous plaintiffs firms consider such action to be inappropriate not only under the PSLRA but also under ethical rules of practice.

. [Network Assoc., 76 F. Supp. 2d at 1040](#): At the request of the court, the SEC submitted a memorandum addressing the issue of plaintiffs' counsel sending notices and certifications to brokers for forwarding to the brokers' clients. The SEC was asked by the court whether it is a violation of the PSLRA, [15 U.S.C. 78o\(c\)\(8\)](#), for a broker/dealer to assist an attorney in establishing communication with potential clients by: (1) either supplying the attorney with mailing labels and accepting reimbursement for the cost of the labels; or (2) directly mailing a letter with the attorney's notice of the suit to affected investors. [Id. at 1040-41](#). The SEC stated that it did not believe the PSLRA provision applies to bona fide reimbursement of reasonable expenses of generating address labels and mailing information to investors. *Id.* at *1041.

IV. CONCLUSION

Four years after its passage, the PSLRA has been interpreted in varying ways concerning the appointment of lead plaintiff and lead counsel. Certain permanent changes, however, have clearly emerged. First, defendants are now sued by sometimes hundreds of individual plaintiffs, and in most cases, defendants are faced with institutional and/or individual lead plaintiffs with substantial losses and corresponding motivations to successfully prosecute the litigation. Second, the procedural steps to determining lead plaintiff and lead counsel plus resulting litigation surrounding those determinations have added substantial delays to the prosecution of shareholder class actions. Otherwise, the process of choosing lead plaintiff and lead counsel remains very much in flux. Stay tuned.
