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THE LEAD PLAINTIFF AND LEAD COUNSEL PROVISIONS OF THE PSLRA: A DEFENSE PERSPECTIVE

In Securities Class Actions, the PSLRA Puts the District Court at the Center of the Appointment Process for Lead Plaintiff and Requires Court Approval of Lead Counsel. After Setting Out the Standards for Lead Plaintiff Appointment and Lead Counsel Approval, the Authors Discuss Permissible Multi-Investor Groups, New Claims Made After Appointment, Defendant's Standing to be Heard, Approval of Counsel, and a Constitutional Challenge to the Act.

By John H. Henn, Stephen C. Warneck, & Kalun Lee*

Passed in 1995, the Private Securities Litigation Reform Act ("PSLRA") was designed to curb abuses occurring in private securities class action litigation. Among the enacted measures were provisions for appointment by the court of a lead plaintiff (or, in some instances, a lead plaintiff group or two or more co-lead plaintiffs), and approval by the court of lead plaintiff's selection of lead counsel (or, again, in some instances, two or more co-lead counsel or lead or co-lead counsel and liaison counsel). The intent of these provisions was to have injured shareholders themselves, and not their lawyers, actually control securities class action litigation, so that there would be fewer base-

less lawsuits brought and controlled by lawyers with the goal of simply extracting settlements. Courts have generally taken seriously the lead plaintiff and lead counsel requirements, and have carefully reviewed lead plaintiff applications and lead counsel selections to ensure that those requirements are being met.

It is important, of course, that the plaintiff's bar understand the lead plaintiff and lead counsel provisions so that plaintiffs and their lawyers can adhere to the procedural and substantive requirements. But it is equally important for the defendant's bar to understand the provisions and, where appropriate, actively to participate in the lead plaintiff and lead counsel appointment and selection process. These provisions are a significant part of the protection afforded defendants by the PSLRA. Where defen-

*JOHN H. HENN is a partner and the head of the Securities and Corporate Disputes, Banking Litigation, and Appellate Practice groups at the Boston office of Foley Hoag LLP. STEPHEN C. WARNECK is an associate and a member of the Securities and Corporate Disputes, Accountants Professional Liability, and Business Crimes and Government Investigations groups at Foley Hoag. KALUN LEE is an associate and a member of the Accountants Professional Liability and Intellectual Property Litigation groups at Foley Hoag. Their email addresses are, respectively, jhenn@foleyhoag.com, swarneck@foleyhoag.com, and klee@foleyhoag.com.

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dants and courts can be counted on to hold plaintiffs to their burden of being truly interested and active plaintiffs, it will be more difficult for plaintiffs' lawyers to bring extortionate and expensive strike suits.

STATUTORY PROCEDURE

The concept of a "lead plaintiff" was created by the 1995 enactment of the PSLRA, which is codified in part at 15 U.S.C. Sections 77z-1 and 78u-4.

The plaintiff who files the initial action must publish a notice to the members of the putative class within 20 days of filing the action informing them of their right to file motions for appointment as lead plaintiff.¹ Within 60 days of publication of that initial notice, any putative class member or group of putative class members may move the court for appointment as lead plaintiff, regardless of whether it has previously filed a complaint in the action.² Within 90 days of publication of the initial notice, the court "shall consider" any motion made by a putative class member in response to the notice.³ Note that up to 60 of these days may pass before any motion is filed, leaving 30 days for the court to "consider" the motion(s) for appointment as lead plaintiff. The 90-day

period will not apply at all, however, if one or more of the plaintiffs make a motion to consolidate, as motions to consolidate must be decided first. The motion for appointment as lead plaintiff shall be decided "as soon as practicable" thereafter.⁴

The court "shall appoint" as lead plaintiff the member or members of the putative class that "the court determines to be most capable of adequately representing the interests of class members."⁵ Upon appointment, the lead plaintiff "shall, subject to the approval of the court, retain counsel to represent the class," i.e., lead counsel.⁶

COURT CONSIDERATION OF PROPOSED LEAD PLAINTIFFS

A motion for appointment as lead plaintiff should be evaluated in light of the purposes of the PSLRA in general, and in light of the purposes for which the lead plaintiff position was created in particular.

The PSLRA was intended in general to deter "baseless and extortionate securities lawsuits,"⁷ due to significant evidence of abuse, such as the "routine filing" of lawsuits "whenever there is a significant change in the issuer's

1. 15 U.S.C. § 77z-1(a)(3)(A)(i); 15 U.S.C. § 78u-4(a)(3)(A)(i).
2. 15 U.S.C. §§ 77z-1(a)(3)(A) and (B); 15 U.S.C. §§ 78u-4(a)(3)(A) and (B).
3. 15 U.S.C. § 77z-1(a)(3)(B)(i); 15 U.S.C. § 78u-4(a)(3)(B)(i).

4. 15 U.S.C. § 77z-1(a)(3)(B)(ii); 15 U.S.C. § 78u-4(a)(3)(B)(ii).
5. 15 U.S.C. § 77z-1(a)(3)(B)(i); 15 U.S.C. § 78u-4(a)(3)(B)(i).
6. 15 U.S.C. § 77z-1(a)(3)(B)(v); 15 U.S.C. § 78u-4(a)(3)(B)(v).
7. H.R. Conf. Rep. No. 104-369, at 32 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 731.

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stock price” without regard to culpability and in the hope that “the discovery process might lead eventually to some plausible cause of action.”⁸ One means of achieving this objective was to have the investors with a significant stake in the litigation, rather than their lawyers, control the litigation. “The PSLRA was enacted with the explicit hope that institutional investors, who tend to have by far the largest financial stakes in securities litigation, would step forward to represent the class and exercise effective management and supervision of the class lawyers.”⁹ Indeed, “[t]he principal impetus underlying [the PSLRA] was the belief that the plaintiff’s bar had seized control of class actions suits, bringing frivolous suits on behalf of only nominally interested plaintiffs in the hope of obtaining a quick settlement.”¹⁰

Through the PSLRA, Congress attempted to terminate the pre-1995 practice in which the class lawyer selected the class plaintiff, and adopt a new mechanism under which “the district courts ... appoint a lead plaintiff or lead plaintiff group to represent aggrieved shareholders and requir[e] these lead plaintiffs to select counsel.”¹¹ Under the PSLRA, the court “shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members,”¹²

and “[t]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.”¹³ The PSLRA thus places the court at the center of the lead plaintiff and lead counsel selection process, and contemplates that the court will be in a position to make an informed and meaningful choice.

The PSLRA requires anyone seeking to serve as lead plaintiff to supply information to the court in a sworn certification.¹⁴ This certification supplies the court with a statutory baseline of information to aid the court’s review and ultimate decision. The named plaintiff(s) will have already filed such a certification with the complaint, as Section 77z-1(a)(2) requires this.¹⁵

The PSLRA creates a rebuttable presumption that the “most adequate plaintiff” to be selected as lead plaintiff will be the “person or group of persons” that:

- (aa) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);
- (bb) in the determination of the court, 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.¹⁶

This presumption may be rebutted “only upon proof by a member of the purported plaintiff class that the presumptively most adequate plaintiff”:

- (aa) will not fairly and adequately protect the interests of the class; or

8. *Id.* at 730.

9. *Sakhrani v. Brightpoint, Inc.*, 78 F. Supp. 2d 845, 850 (S.D. Ind. 1999)(citing H.R. Conf. Rep. No. 104-67, at 34-35 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 733-34; Sen. Rep. No. 104-98 (1995), at 10-11, *reprinted in* 1995 U.S.C.C.A.N. 679, 689-90). *See also* *In re Cavanaugh*, 306 F.3d 726, 729 (9th Cir. 2002)(“Dissatisfied with [a race to the courthouse as the] mechanism for selecting the lead plaintiff, and with various other aspects of securities class action litigation, Congress passed the Reform Act in 1995.”); *ABC Arbitrage v. Tchuruk*, 291 F.3d 336, 354 (5th Cir. 2002)(“The PSLRA was enacted, in part, to compensate for ‘the perceived inability of Rule 9(b) to prevent abusive, frivolous strike suits.’”) (internal citations omitted); *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 191 (1st Cir. 1999)(“The enactment of the PSLRA in 1995 marked a bipartisan effort to curb abuse in private securities lawsuits, particularly the filing of strike suits.”)(citing H.R. Conf. Rep. No. 104-369, at 32 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 731).

10. *Greebel v. FTP Software, Inc.*, 939 F. Supp. 57, 58 (D. Mass. 1996).

11. *In re BankAmerica Corp. Sec. Litig.*, 350 F.3d 747, 751 (8th Cir. 2003); *see also* *In re Network Assocs., Inc. Sec. Litig.*, 76 F. Supp. 2d 1017, 1020 (N.D. Cal. 1999) (under the new mechanism, “the court would appoint the lead plaintiff who, in turn, would select and direct class counsel”); H.R. Conf. Rep. No. 104-369, at 32-35 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 731-34.

12. 15 U.S.C. § 77z-1(a)(3)(B)(i); 15 U.S.C. § 78u-4(a)(3)(B)(i).

13. 15 U.S.C. § 77z-1(a)(3)(B)(v); 15 U.S.C. § 78u-4(a)(3)(B)(v).

14. 15 U.S.C. § 77z-1(a)(2); 15 U.S.C. § 78u-4(a)(2) (requiring, *inter alia*, review of complaint; non-acquisition of stock at the direction of counsel or to participate in a lawsuit; agreement to serve as class representative; identity of class actions in the past three years in which sought to be a representative party; agreement not to accept any payment for serving as representative beyond pro rata share of any recovery, except as ordered or approved by the court; and transactions in the stock in question).

15. *In re Eaton Vance Corp. Sec. Litig.*, 219 F.R.D. 38, 42 (D. Mass. 2003).

16. 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I); 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

(bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.¹⁷

The PSLRA seeks to prevent the use of “professional plaintiffs” by preventing anyone from serving as a lead plaintiff (or officer, director, or fiduciary of a lead plaintiff) in more than five securities class actions during any three-year period “[e]xcept as the court may otherwise permit, consistent with the purposes of this section,”¹⁸ The exception for court permission was designed to permit institutions, the favored lead plaintiffs under the PSLRA, to appear more often, and courts have applied the exception to do just that.¹⁹ In *Casden v. HPL Technologies, Inc.*, for example, the court held that institutional investors were not bound by the PSLRA’s bar on professional plaintiffs.²⁰

A “Group” as Lead Plaintiff

The PSLRA expressly contemplates that a “group of persons” may constitute the “most adequate plaintiff.”²¹ Courts are divided, however, as to the nature of the relationship that the group members must have with each other before the group may be appointed as lead plaintiff.²²

Some courts reject the appointment of *any* group of unrelated plaintiffs.²³ The reasons for such a *per se* rule were articulated by the Southern District of New York in *In re Donnkenny Inc. Securities Litigation*:

To allow an aggregation of unrelated plaintiffs to serve as lead plaintiffs defeats the purpose of choosing a lead plaintiff. One of the principal legislative purposes of the PSLRA was to prevent lawyer-driven litigation. Appointing lead plaintiff on the basis of financial interest, rather than on a “first come, first serve” basis, was intended to ensure that institutional plaintiffs with expertise in the securities market and real financial interests in the integrity of the market would control the litigation, not lawyers. To allow lawyers to designate unrelated plaintiffs as a “group” and aggregate their financial stakes would allow and encourage lawyers to direct the litigation. Congress hoped that the lead plaintiff would seek the lawyers, rather than having the lawyers seek the lead plaintiff.²⁴

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17. 15 U.S.C. § 77z-1(a)(3)(B)(iii)(II); 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). See *In re Cavanaugh*, 306 F.3d at 729 n.2 (presumption rebutted only upon proof that presumptively most adequate plaintiff does not satisfy the adequacy and typicality requirements of Rule 23); see also *In re Royal Ahold N.V. Sec. and ERISA Litig.*, 2003 U.S. Dist. LEXIS 24064, *28 (D. Md. 2003)(presumption rebutted because presumptive lead plaintiff was foreign and subject to unique defense of lack of subject matter jurisdiction and because foreign courts might not recognize or enforce a decision by a United States court); *In re Comdisco Sec. Litig.*, 141 F. Supp. 2d 951, 953 (N.D. Ill. 2001)(presumption effectively rebutted “if the presumptive lead plaintiffs were to insist on their class counsel handling the action on the hypothesized materially less favorable contractual basis”)(quoting with approval *In re Bank One S’holders Class Actions*, 96 F. Supp. 2d 780, 784 (N.D. Ill. 2000)).
18. 15 U.S.C. § 77z-1(a)(3)(B)(vi); 15 U.S.C. § 78u-4(a)(3)(B)(vi).
19. See *In re Critical Path Sec. Litig.*, 156 F. Supp. 2d 1102, 1112 (N.D. Cal. 2001)(quoting H.R. Conf. Rep. No. 104-396, at 35 (1995)), *reprinted in* 1995 U.S.C.C.A.N. 730, 734).
20. 2003 U.S. Dist. LEXIS 19606, *33-34 (N.D. Cal. 2003); see also *Smith v. Suprema Specialties*, 206 F. Supp. 2d 627, 641 (D.N.J. 2002)(same).
21. 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I); 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).
22. See *In re Lernout & Hauspie Sec. Litig.*, 138 F. Supp. 2d 39, 43-45 (D. Mass. 2001)(citing several cases that follow varied approaches); *In re Microstrategy Inc. Sec. Litig.*, 110 F. Supp. 2d 427, 434-35 (E.D. Va. 2000)(same).

Other courts have declined to adopt any *per se* rule against a lead plaintiff group of unrelated plaintiffs. Instead, they have considered the adequacy of the group in light of the policy goal that drove the PSLRA’s enact-

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23. See, e.g., *In re Conseco, Inc. Sec. Litig.*, 120 F. Supp. 2d 729, 733 (S.D. Ind. 2000)(“While a lead plaintiff ‘group’ may be permissible, this District Court has stressed that aggregating parties that ‘have nothing in common with one another beyond their investment is not an appropriate interpretation of the term ‘group’ in the PSLRA.”)(quoting *Sakhrani*, 78 F. Supp. 2d at 853); *In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803, 816 (N.D. Ohio 1999)(“Such an amalgamation [of unrelated investors] is simply inconsistent with the definition of group intended by the PSLRA, as revealed by the statute’s language, context, overall scheme, and purpose.”).
24. 171 F.R.D. 156, 157-58 (S.D.N.Y. 1997)(citations omitted). See also *Bowman v. Legato Sys., Inc.*, 195 F.R.D. 655, 658 (N.D. Cal. 2000)(rejecting appointment of a six-member group because “[t]he six members of the Legato Group had no pre-existing relationship. To the contrary, it appears that the members of the Legato Group were hand-picked by the Milberg firm for the sole purpose of obtaining lead plaintiff status, thus conferring lead plaintiff’s counsel status on the Milberg firm.”).

ment, that the group be able to monitor and control the litigation and the lawyers.²⁵

In many cases, plaintiffs or their attorneys will aggregate the losses of several (or even many) investors in order to meet the “largest financial interest” requirement and take control of the litigation. But such aggregation often defeats the purpose of the “largest financial interest” requirement. While the group may have the “largest financial interest,” its individual members may have interests that are, in fact, not large, and, accordingly, little motivation or capability to direct a large litigation and control the lawyers involved. Courts therefore look upon such aggregations with great suspicion.²⁶

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25. See, e.g., *In re Cavanaugh*, 306 F.3d at 731 n.8 (observing that “a ‘group of persons’ can collectively serve as a lead plaintiff, [although] we are not asked to determine whether a group can satisfy the ‘largest financial interest’ requirement by aggregating losses”)(internal citations omitted); *Janovici v. DVI, Inc.*, 2003 WL 22849604, at *13 (E.D. Pa. 2003)(considering but declining to appoint co-lead plaintiff because neither need nor benefit to the class was demonstrated); *In re NorthWestern Corp. Sec. Litig.*, 2003 U.S. Dist. LEXIS 24190, *19-20 (D.S.D. 2003)(“the text of the PSLRA does not limit the composition of a ‘group of persons’ to those only with a pre-litigation relationship, nor does the legislative history provide a sound enough foundation to support such a gloss”) (citing *In re Baan Co. Sec. Litig.*, 186 F.R.D. 214, 216 (D.D.C. 1999)); *In re Lernout & Hauspie Sec. Litig.*, 138 F. Supp. 2d at 44 (“[t]he weight of the case law suggests that the trial court has the discretion to designate a triumvirate of unrelated persons as a lead plaintiff group”); *In re Tyco Int’l, Ltd. Sec. Litig.*, 2000 U.S. Dist. LEXIS 13390, *16 (D.N.H. 2000)(appointing three lead plaintiffs and noting that “while a group comprised of many small shareholders might be unwieldy and lack the proper incentive to serve as an effective lead plaintiff ... a group that consists of a small number of large shareholders should be capable of managing this litigation and providing direction to class counsel.”); *In re Network Assocs., Inc. Sec. Litig.*, 76 F. Supp. 2d at 1026 (a group must, “like an institution or single large investor, be able to actively oversee the conduct of the litigation and monitor the effectiveness of counsel”)(quoting *Amicus Curiae Brief for the SEC at 12, Parnes v. Digital Lightwave, Inc.*, No. 99-11293-FF (11th Cir. Aug. 25, 1999) available at <http://www.sec.gov/litigation/briefs/diglight.htm>); *In re Baan Co. Sec. Litig.*, 186 F.R.D. 214, 216-17 (D.D.C. 1999) (requiring that a group of unrelated investors be small enough to be capable of effectively handling the litigation and the lawyers and holding that “where unrelated investors are to be Lead Plaintiff, a triumvirate is preferable”).
26. See, e.g., *In re Lernout & Hauspie Sec. Litig.*, 138 F. Supp. 2d at 44 (“a Court should not blindly aggregate the losses of unrelated plaintiffs to confer lead plaintiff status on a group without considering whether the grouping is sufficiently coherent to control the litigation”); *In re Network Assocs., Inc. Sec. Litig.*, 76 F. Supp. 2d at 1024; *In re Bank One S’holders Class Actions*, 96 F. Supp. 2d at 783 (“Indeed, any choice that was based on the number of shares held by such an assemblage of small holders
(footnote continued on next column...)

At minimum, a multi-investor group moving for appointment as lead plaintiff should be able to provide the Court with some explanation and justification for the group arrangement. The SEC has described the necessary process as follows:

To enable the court to assess whether the proposed group is capable of performing the lead plaintiff function, [the group] should provide appropriate information about its members, structure, and intended functioning. Such information should include descriptions of its members, including any pre-existing relationships among them; an explanation of how it was formed and how its members would function collectively; and a description of the mechanism that its members and the proposed lead counsel have established to communicate with one another about the litigation. If the proposed group fails to explain and justify its composition and structure to the court’s satisfaction, its motion should be denied or modified as the court sees fit.²⁷

A lead plaintiff needs to be able to show that its members “have a special capacity to provide able and unified decision making independent of counsel.”²⁸ Courts have not hesitated to require prospective lead plaintiffs

(footnote continued...)

- would really subvert the purposes of the Reform Act by maximizing the prospect that the lawsuit would truly be run by the lawyers and not by the client class members (none of whom might have a sufficient amount at stake to justify the necessary investment of time and effort to exercise meaningful control of the litigation).”; R. Chris Heck, Comment, *Conflict and Aggregation: Appointing Institutional Investors as Sole Lead Plaintiffs Under the PSLRA*, 66 U. CHI. L. REV. 1199, 1220-22 (1999)(describing ways in which “aggregation reduces plaintiffs’ incentives to monitor and transfers control from plaintiff investors to their lawyers”).
27. *Amicus Curiae Brief for the SEC at 11, Parnes v. Digital Lightwave, Inc.*, No. 99-11293-FF (11th Cir. Aug. 25, 1999) available at <http://www.sec.gov/litigation/briefs/diglight.htm>. See also *In re Lucent Techs., Inc. Sec. Litig.*, 194 F.R.D. 137, 151 (D.N.J. 2000)(outlining requirements similar to those the SEC suggests).
28. *Amicus Curiae Brief for the SEC at 12, In re Baan Co. Sec. Litig.*, 186 F.R.D. 214 (D.D.C. 1999)(No. 98-2465 (JHG)), available at <http://www.sec.gov/litigation/briefs/baanbrf.htm>.

to supply more information when their applications are insufficient.²⁹

Many courts have rejected the option of appointing multiple, “co-lead” plaintiffs, comprised of multiple *separate plaintiffs* (each of which would then select the same or different lead counsel), as opposed to a lead plaintiff *group*.³⁰ Some courts have made such appointments, however, in limited circumstances.³¹

Rule 23 Class Action Requirements

The PSLRA also conditions selection of a lead plaintiff on an applicant’s making a *prima facie* showing that it satisfies the class representative typicality and adequacy requirements contained in Fed.R.Civ.P. 23(a)(3) and

23(a)(4), respectively.³² A class member may serve as a class representative only if, among other requirements, that member asserts claims or defenses that “are typical of the claims or defenses of the class.”³³ This familiar typicality requirement is met “when each class member’s claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant’s liability.”³⁴ With respect to adequacy, the class member, if it is to serve as class representative, must also be able to “fairly and adequately protect the interests of the class.”³⁵ To fulfill this requirement, a plaintiff “must show . . . that the interests of the representative party will not conflict with the interests of any of the class members”³⁶

The adequacy requirement has assumed new significance because of the PSLRA — not only for determining whether a lead plaintiff can later be certified as a class representative, but also for selecting a lead plaintiff. As to class certification:

Any lingering uncertainty, with respect to the adequacy standard in securities fraud class actions, has been conclusively resolved by the PSLRA’s requirement that securities class actions be managed by active, able class representatives who are informed and can demonstrate they are directing the litigation. In this way, the PSLRA raises the standard adequacy threshold.³⁷

Moreover, this more vigorous adequacy threshold that

29. *See, e.g.*, In re Network Assocs., Inc. Sec. Litig., 76 F. Supp. 2d at 1027 (describing court’s reliance upon a court-devised questionnaire, a court hearing, and short depositions to determine the most adequate plaintiff); In re Milestone Scientific Sec. Litig., 183 F.R.D. 404, 419 (D.N.J. 1998) (directing lead plaintiff to re-brief an issue); In re Baan Co. Sec. Litig., 186 F.R.D. at 218 (requiring counsel to brief an issue).

30. *See, e.g.*, In re Milestone Scientific Sec. Litig., 183 F.R.D. at 417 (“While the PSLRA refers to ‘a person or group of persons’ as capable of serving as the lead plaintiff, the surrounding statutory language forecloses the appointment of multiple groups or multiple persons not part of a cohesive group. Significantly, apart from the sole reference to a ‘group of persons,’ the PSLRA is worded in the singular, providing a mechanism for the appointment of ‘the most adequate *plaintiff*,’ not the most adequate plaintiffs.”); Gluck v. Cellstar Corp., 976 F. Supp. 542, 549-50 (N.D. Tex. 1997)(noting that co-lead plaintiffs might be appropriate in situations where plaintiffs had roughly equal economic losses and where there is no plaintiff with significantly larger interests but finding that “[i]ncreasing the number of Lead Plaintiffs would detract from the Reform Act’s fundamental goal of client control, as it would inevitably delegate more control and responsibility to the lawyers for the class and make the class representatives more reliant on the lawyers.”); In re Advanced Tissue Sciences Sec. Litig., 184 F.R.D. 346, 351 (S.D. Cal. 1998)(finding that the proposal “that the Court appoint co-lead plaintiffs and co-lead counsel from both moving groups -- is unsupported by solid legal precedent” and “is in tension with the PSLRA’s goal of minimizing lawyer-driven litigation”).

31. *See* In re Cable & Wireless, PLC Sec. Litig., 217 F.R.D. 372, 376 (E.D. Va. 2003)(appointing an individual investor and an institutional investor as co-lead plaintiffs because neither standing alone adequately represented the class); Piven v. Sykes Enters., Inc., 137 F. Supp. 2d 1295, 1303-1304 (M.D. Fla. 2000)(co-lead plaintiff status recommended by magistrate judge for two institutional investors agreeing to work together and alleging approximately equal losses); In re Oxford Health Plans, Inc. Sec. Litig., 182 F.R.D. 42, 47-49 (S.D.N.Y. 1998)(rejecting the SEC’s amicus position and appointing three separate plaintiffs as co-lead plaintiffs).

32. *See* 15 U.S.C. § 77z-1(a)(3)(B)(iii)(I)(cc); 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc); In re Cavanaugh, 306 F.3d at 729-30; In re Cendant Corp. Sec. Litig., 264 F.3d 201, 264 (3d Cir. 2001); In re Royal Ahold N.V. Sec. Litig., 2003 U.S. Dist. LEXIS 24064 at *21; Janovici v. DVI, Inc., 2003 WL 22849604, *29 (E.D. Pa. 2003); In re Oxford Health Plans, Inc. Sec. Litig., 182 F.R.D. at 49.

33. Fed.R.Civ.P. 23(a)(3).

34. In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 291 (2d Cir. 1992); *see also* In re Cable & Wireless, PLC Sec. Litig., 217 F.R.D. at 375 (same).

35. Fed. R. Civ. P. 23(a)(4).

36. Andrews v. Bechtel Power Corp., 780 F.2d 124, 130 (1st Cir. 1985); *see also* In re Cendant Corp. Sec. Litig., 264 F.3d at 265-66; Janovici, 2003 WL 22849604, at *13.

37. Berger v. Compaq Computer Corp., 257 F.3d 475, 483 (5th Cir. 2001). But *see* In re Cavanaugh, 306 F.3d at 737 (disagreeing with *Berger* that the PSLRA raised the standard adequacy threshold).

the PSLRA arguably creates for the class certification context logically also applies to the lead plaintiff selection process. A court might be inclined to apply the standard less vigorously at the lead plaintiff appointment stage, however, because, under the PSLRA, a defendant cannot conduct discovery with respect to lead plaintiff appointment, as a defendant certainly can do with respect to class certification, and because a defendant will have a second chance at the class certification stage to challenge adequacy, and can do so *de novo* and without prejudice from the fact of lead plaintiff appointment.³⁸

Lead Plaintiff Assertion of New Claims

Frequently, cases arise with fact scenarios suggesting potential claims under both the Securities Act (“’33 Act”) and the Securities and Exchange Act (“’34 Act”). At the time the original complaint is filed, a plaintiff with a ’34 Act claim may be easier to find, and the original complaint may contain only that claim. During the subsequent 80 day period for motions for appointment as lead plaintiff (the 20 days to publish a notice to the proposed class, and the additional 60 days to move for appointment), an additional person may emerge who does have a ’33 Act claim, and who is then proposed to be a lead plaintiff or a co-lead plaintiff.

Query first whether the appointment of a lead plaintiff who was not an original name plaintiff has the effect of adding a new plaintiff to the existing complaint absent the allowance of a separate motion to amend. Nothing in the PSLRA *expressly* states that appointment of a lead plaintiff not named in the original complaint automatically amends that complaint to add that lead plaintiff as a named party. If the PSLRA is also deemed not to *imply* such a result, the addition of the previously unnamed plaintiff would need to be accomplished through amendment of the complaint. Because an original complaint is typically not met with a responsive pleading (but, instead, with a motion to dismiss), the plaintiff could amend the complaint as of right under Fed.R.Civ.P. 15(a), but a plaintiff would typically prefer not to use up that one “free” amendment simply to add a plaintiff. The only alternative, however, is to move for leave to amend.

Another issue arising when a proposed lead plaintiff has been added to assert a claim that the original name

plaintiffs had no standing to bring is whether that new plaintiff’s claim might be deemed untimely. For example, what happens if the statute of limitations (e.g., the two-year discovery statute for ’33 Act claims under the Sarbanes Oxley Act³⁹) expires before the complaint is amended to add a new claim (e.g., a ’33 Act claim) where the only plaintiff with standing to assert that claim was not named in the original complaint, and was added (and appointed as a lead plaintiff) only at the lead plaintiff appointment stage?

Fed.R.Civ.P. 15(c)(3) addresses when an amendment adding a party and a claim relates back to the date of the original complaint. The test has three parts: (1) the new claim must arise out of the same conduct, transaction, or occurrence as in the original complaint; (2) there must be sufficient identity of interest between the new and old plaintiffs so defendant has fair notice of the “latecomer’s claim”; and (3) there must be no undue prejudice.⁴⁰ If both the lead plaintiff appointment and the amendment post-date the expiration of the statute of limitations (assuming, in this example, the discovery statute applies), the new claim will be time-barred if it does not relate back to the time of filing of the original complaint. The likelihood of such a bar might be lower if the amended complaint were filed after the bar date but the lead plaintiff was appointed before the bar date *and* there were some disclosure in the lead plaintiff motion papers that this person was being proposed as lead plaintiff in order to have a lead plaintiff with standing to assert a new claim.

39. 28 U.S.C. § 1658.

40. See *Allied Int’l, Inc. v. International Longshorem’n’s Ass’n, AFL-CIO*, 814 F.2d 32, 35-36 (1st Cir. 1987)(outlining 3-part test for relation back of new claims of a “fresh plaintiff”); see also *Young v. Lepone*, 305 F.3d 1, 15-17 (1st Cir. 2002)(denying motion to relate new plaintiffs’ securities claims back because “[p]ersons who are identified with each other only by their ownership of stock in the same publicly-traded corporation share some of the same rights, but that fact, standing alone, does not place them in the kind of proximity needed to invoke Rule 15(c)(3)[.]” but suggesting that result would be different if original complaint were couched as a class action); *In re Glacier Bay*, 746 F. Supp. 1379, 1391 (D. Alaska 1990)(claims of new plaintiff relate back because original complaint gave notice of claims); *In re Elscint, Ltd. Sec. Litig.*, 674 F. Supp. 374, 382 (D. Mass 1987)(denying motion to intervene to raise ’33 Act Section 11 claim after expiration of statute where original plaintiffs lacked standing to assert claim).

38. Greebel, 939 F. Supp. at 60.

DEFENDANT'S OPPOSITION TO THE PROPOSED LEAD PLAINTIFF

There are several reasons why a defendant may want to oppose or comment on a proposed lead plaintiff. First, the defendant may very well have a duty to assist the court so that the court will be better able to avoid making an “uninformed decision of a kind that a United States District Judge committed to professionalism is not permitted to make.”⁴¹ If the court is to engage in serious and thorough judicial evaluation of lead plaintiff applications, it needs the benefit of a defendant’s critical analysis of those filings. Second, the lead plaintiff application itself may reveal the case to be “lawyer-driven litigation” in which, rather than the “the lead plaintiff [seeking] the lawyers, ... the lawyers seek the lead plaintiff.”⁴² If so, the early revelation of this fact to the court helps the court and probably will help a defendant. Third, fewer lead plaintiffs may mean fewer proposed class representatives, and fewer depositions during class discovery. Finally, if the original plaintiffs lack standing to assert some claim, and it appears that a lead plaintiff who is not an original plaintiff is being proposed to cure that lack, the lead plaintiff application deserves close scrutiny in light of issues that conceivably could arise with respect to proper amendment of the complaint and timeliness of the later-asserted claim.

Defendant’s Standing

Courts have divided on whether a defendant has formal standing to oppose a lead plaintiff application. Some courts have limited such standing to procedural issues.⁴³ Others have granted standing on the ground that it will aid the court in the decision-making called for by the PSLRA. In *King v. Livent, Inc.*, the court sensibly concluded that, because “a therapeutic appointment process

such as is envisaged by the PSLRA will work better with more information than less,” defendants have standing to challenge lead plaintiff applications.⁴⁴ In *Craig v. Sears Roebuck & Co.*, however, the court noted that “[a]part from the questionable motives of a defendant objecting to the inadequacy of a particular plaintiff to lead a class that defendant wishes defeated, the statutory language would seem to preclude a defendant’s objections.”⁴⁵

In *Greebel v. FTP Software*, the court denied formal standing for substantive challenges, relying on two subsections of the PSLRA: 15 U.S.C. Sections 78u-4(a)(3)(B)(iii)(II) and 78u-4(a)(3)(B)(iv) (15 U.S.C. Sections 77z-1(a)(3)(B)(iii)(II) and 77z-1(a)(3)(B)(iv) in the ‘33 Act).⁴⁶ It appears, however, that neither subsection dictates that conclusion. The first states that the presumption that a particular individual or group is the “most adequate plaintiff” may be rebutted “only upon proof *by a member of the purported class* that the presumptively most adequate plaintiff (aa) will not fairly and adequately protect the interests of the class; or (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.”⁴⁷ However, as the court in *King v. Livent* stated, “nothing in the text of the Reform Act precludes or limits the right of defendants to be heard on this issue.”⁴⁸ The second subsection of the PSLRA, which concerns discovery,⁴⁹ is similarly silent on the issue of a defendant’s discovery and arguably has no bearing where defendants have not asked to conduct any discovery.

In any event, a court ruling on a motion for appointment of lead plaintiff certainly can, if it wishes, and probably should, take account of a defendant’s arguments in assessing the plaintiffs’ submissions.⁵⁰ If the decision to

41. In re PRI Automation, Inc. Sec. Litig., 145 F. Supp. 2d 138, 145 (D. Mass. 2001)(Keeton, J.)(appointment of a lead plaintiff requires an informed judicial decision).

42. In re Donnkenny Inc. Sec. Litig., 171 F.R.D. 156, 157-58 (S.D.N.Y. 1997).

43. See, e.g., *Holley v. Kitty Hawk, Inc.*, 200 F.R.D. 275, 277 (N.D. Tex. 2001)(defendant had standing to challenge procedural issues but not the adequacy of the plaintiff); *Greebel v. FTP Software*, 939 F. Supp. 57, 61 (D. Mass. 1996). See also *Bell v. Ascendant Solutions, Inc.*, 2002 U.S. Dist. LEXIS 6850, *7 (N.D. Tex. 2002)(“the majority of courts — and this court — have concluded that a defendant does not have standing to object”).

44. 36 F. Supp. 2d 187, 191 (S.D.N.Y. 1999).

45. 2003 U.S. Dist. LEXIS 4959 at *4 n.1 (N.D. Ill. 2003).

46. 939 F. Supp. at 59-61.

47. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II) (emphasis added)(15 U.S.C. § 77z-1(a)(3)(B)(iii)(II) in the ‘33 Act).

48. *King* 36 F. Supp. 2d at 190 (citations omitted).

49. That subsection states that “discovery relating to whether a member or members of the purported plaintiff class is the most adequate plaintiff may be conducted by a plaintiff only if the plaintiff first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iv) (15 U.S.C. § 77z-1(a)(3)(B)(iv) in the ‘33 Act).

50. See, e.g., *Fields v. Biomatrix, Inc.*, 198 F.R.D. 451, 454 (D.N.J. 2000) (“Regardless of whether Defendants formally have standing (in which case this Court is obligated to consider their arguments), nothing in the Reform Act prevents this Court from (footnote continued on next column...)”).

appoint a lead plaintiff requires the exercise of judicial professionalism,⁵¹ and not the application of a rubber stamp, a court should certainly welcome assistance from the defendant, who may be the only available source of critical comment on a lead plaintiff motion.⁵² Consideration by the court of defendants' arguments arguably supports the PSLRA's purposes of "identifying the plaintiff or plaintiffs who are the most strongly aligned with the class of shareholders, and most capable of controlling the selection and actions of counsel"⁵³ and "transfer[ing] primary control of private securities litigation from lawyers to investors."⁵⁴ The particular mechanism selected by Congress to achieve these goals was heightened court supervision in the selection of both the lead plaintiffs controlling the prosecution of the actions and their chosen lead counsel.⁵⁵ More information, no matter its source, will assist the court in serving that essential gatekeeping function.⁵⁶

The question does remain as to whether a decision adverse to the defendant's arguments creates any appellate rights. As a matter of logic, it appears that any appellate rights would be created only if the defendant had standing to raise the arguments in the first place.

SELECTION OF LEAD COUNSEL

The PSLRA states that "[t]he most adequate plaintiff

shall, subject to the approval of the court, select and retain counsel to represent the class."⁵⁷ However, "[t]he judgment of a lead plaintiff or proposed lead counsel is not dispositive in the appointment of lead counsel."⁵⁸ Rather, as expressly stated in the statute, the lead plaintiff's selection of lead counsel is subject to court approval.

The deference accorded that selection varies from court to court, however. Courts have generally given some deference to the lead plaintiff's choice of counsel, at least where the lead plaintiff could plausibly be assumed to have independently assessed the matter and reached a decision on its own, and perhaps where the fee arrangement was sufficiently disclosed to satisfy the court that there was nothing improper about it.⁵⁹ By contrast, some courts have taken firm control of the lead counsel selection process.⁶⁰ Instead of simply examining the lead plaintiff's choice to determine whether it is appropriate, such courts order some form of competitive selection.⁶¹

(footnote continued...)

considering the arguments raised and authorities cited by Defendants.") (internal citations omitted); *In re First Union Corp. Sec. Litig.*, 157 F. Supp. 2d 638, 641 (W.D.N.C. 2000) (same); *Takeda v. Turbodyne Techs., Inc.*, 67 F. Supp. 2d 1129, 1138 (C.D. Cal. 1999) (denying standing to defendants but noting that "[n]evertheless, the court may *sua sponte* raise and address certain of the concerns addressed in defendants' statement").

51. See *In re PRI Automation, Inc. Sec. Litig.*, 145 F. Supp. 2d at 145.

52. See, e.g., *In re Orthodontic Ctrs. of Am., Inc. Sec. Litig.*, 2001 U.S. Dist. LEXIS 21816, *6 (E.D. La. 2001) ("nothing in the Reform Act ... would prevent the Court from considering the arguments raised by the defendants, especially ... where there [is] no adversarial presentation of the issue"); *In re First Union Corp. Sec. Litig.*, 157 F. Supp. 2d at 141 (consideration of a defendant's arguments on lead plaintiff/counsel selection is "especially appropriate ... where the [arrangement] amongst Plaintiffs prevents any adversarial presentation of this issue").

53. *In re Milestone Scientific Sec. Litig.*, 183 F.R.D. at 404.

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

55. See *D'Hondt v. Digi Int'l Inc.*, 1997 WL 405668, *2 (D. Minn. 1997).

56. See *King*, 36 F. Supp. 2d at 191.

57. 15 U.S.C. § 78u-4(a)(3)(B)(v); 15 U.S.C. § 77z-1(a)(3)(B)(v).

58. *In re Nice Sys. Sec. Litig.*, 188 F.R.D. 206, 222 (D.N.J. 1999); see also *In re Comdisco Sec. Litig.*, 141 F. Supp. 2d at 953 ("It should be remembered that although Subsection (a)(3)(B)(v) provides that the most adequate plaintiffs may 'select and retain counsel to represent the class,' that opportunity is expressly made 'subject to the approval of the court.'") (quoting *In re Bank One S'holders Class Actions*, 96 F. Supp. 2d 780, 784 (N.D. Ill. 2000)).

59. See 15 U.S.C. § 78u-4(a)(3)(B)(v); 15 U.S.C. § 77z-1(a)(3)(B)(v); see also *In re Cavanaugh*, 306 F.3d 726, 736 (9th Cir. 2002) ("there may be fee arrangements that so reek of self-dealing or other impropriety as to suggest that the plaintiff may have sold out the class's financial interests to the lawyer, but beyond such extreme situations there is a wide variety of financial arrangements the proposed lead plaintiff may enter into with his chosen counsel without being stricken as inadequate..."); *Janovici v. DVI, Inc.*, 2003 WL 22849604 at *13 ("the court should not interfere with lead plaintiff's choice of counsel unless such intervention is necessary to protect the interest of the plaintiff class.") (internal citations omitted); *In re Lernout & Hauspie Sec. Litig.*, 138 F. Supp. 2d 39, 46-47 (D. Mass. 2001) ("While the Court should not be a rubber-stamp, it should give the lead plaintiff's group's choice some weight."); *In re Cendant Corp. Sec. Litig.*, 182 F.R.D. 144, 150 (D.N.J. 1998).

60. See, e.g., *In re Comdisco Sec. Litig.*, 141 F. Supp. 2d at 955 ("this Court ... is not about to accept an ultimatum, either from [counsel] Milberg Weiss or from PASERS, that Milberg Weiss must represent the class by reason of PASERS' presumptive status as lead plaintiff").

61. See, e.g., *id.* at 953 ("this Court continues to believe that competitive bidding among highly qualified and well-credentialed plaintiffs class action counsel should be considered as a potential vehicle for awarding the class' legal representation"); *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 79-80 (S.D.N.Y. 2000) (discussing various methods of lead counsel

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Such firm control may not be allowed in all cases, however, and not all courts accept competitive bidding as a proper means of lead counsel determination.⁶²

New Subdivision (g) of Rule 23

Effective Dec. 1, 2003, new subdivision (g) of Rule 23 vests courts with the duty of appointing class counsel that “fairly and adequately represents the interests of the class.” Rule 23(g)(1)(B). Although “a court that certifies a class must appoint class counsel[.]” Rule 23(g)(1)(A) requires that it do so “[u]nless a statute provides otherwise[.]” Thus, subdivision (g) should not apply to securities class actions, as the PSLRA expressly provides an appointment process. Indeed, the Advisory Committee Notes to the 2003 Amendments expressly state that Rule 23(g)(1)(A) “does not purport to supersede or to affect the interpretation of [the PSLRA’s] provisions.” Even if Rule 23(g) does not apply to securities class actions, however, courts may very well consider its purpose and use it to justify their assertion of more control over lead counsel selection than most courts have generally exercised. For example in *In re Cree, Inc. Securities Litigation*, decided on Dec. 17, 2003, the court approved the lead plaintiff’s choice of counsel under the PSLRA, subject to the court’s review as to whether any fees sought were reasonable, noting that it was:

guided in its exercise of its discretion by the provisions of the new Rule 23(g) ... providing that in appointing class counsel the court must consider the work counsel has done in identifying or investigating potential claims in the actions, counsel’s experience in han-

dling class actions and other complex litigation and claims of the types asserted in the present action, counsel’s knowledge of the applicable law, and the resources counsel will commit to representing the class.⁶³

Multiple Firms as Co-Lead Counsel

Where multiple cases have been filed by different law firms, motions to consolidate and then to appoint a lead plaintiff or lead plaintiffs are often accompanied by a proposal that there be “co-lead” counsel or that there be lead counsel or “co-lead” counsel along with “liaison counsel.” Sometimes there are good reasons to have more than one law firm representing the putative class; sometimes not. The proposal may well be dictated not by the litigation needs of the case, but by an arrangement among counsel to avoid competing lead counsel proposals. Any such arrangement likely will not be disclosed to the court absent probing judicial inquiry.

Whether a court will allow more than one lead counsel turns on a balance between the benefits of having the particular law firms involved and the potential additional costs to the plaintiffs of such an arrangement. “The potential for duplicative services and the concomitant increase in attorneys’ fees work against the approval of more than one law firm, especially in cases in which one law firm has the proven ability to adequately manage and litigate securities class actions.”⁶⁴ On the other hand, courts have recognized that “there may be instances in which a class is well-served by having two or more law firms combine to direct the litigation.”⁶⁵

(footnote continued...)

auction and collecting cases); *In re Lucent Techs., Inc. Sec. Litig.*, 194 F.R.D. at 156-57 (ordering a sealed-bid auction); *In re Network Assocs. Sec. Litig.*, 76 F. Supp. 2d at 1034 (requiring lead plaintiff to re-open its consideration of counsel, publicize a request for proposals, evaluate the proposals, and interview candidates “all to obtain the highest quality representation at the lowest price”).

62. See *In re Cendant Corp. Sec. Litig.*, 264 F.3d 201, 273-77 (3d Cir. 2001), (holding that a court-ordered auction is permissible only in limited circumstances, such as where a lead plaintiff indicates it is unwilling or unable to undertake an acceptable selection process); *In re Razorfish, Inc. Sec. Litig.*, 143 F. Supp. 2d 304, 310 (S.D.N.Y. 2001)(“[Sealed bids are] not, in this Court’s view, remotely consistent with the Reform Act”).

63. 2003 U.S. Dist. LEXIS 23244, *9 (M.D.N.C. 2003).

64. *Vincelli v. National Home Health Care Corp.*, 112 F. Supp. 2d 1309, 1315 (M.D. Fla. 2000).

65. *In re Microstrategy Inc. Sec. Litig.*, 110 F. Supp. 2d 427, 440 (E.D. Va. 2000); see also *In re Lernout & Hauspie Sec. Litig.*, 138 F. Supp. 2d at 46 (“in light of the complexity of this litigation, the amount of money at stake, the parties involved, the pendency of a Chapter 11 filing and a bankruptcy proceeding in Belgium, and the three distinct continents ... involved, the plaintiff class may need the resources of three firms to handle such litigation”); *In re Tyco Int’l, Ltd. Sec. Litig.*, 2000 U.S. Dist. LEXIS 13390, *35-36 (D.N.H. 2000) (“approval of multiple firms as co-lead counsel may provide the purported class with the benefits of combined resources and expertise, which may be especially valuable in a complex case where the defendants are represented by several large and highly qualified law firms”).

Courts will often demand clear and substantial justification for the use of more than one law firm, reasoning in most cases that a capable law firm can surely handle an entire class action litigation.⁶⁶ In *In re Nice Systems Securities Litigation*, for example, the court rejected the lead plaintiff group's proposal that one firm be appointed lead counsel and a second law firm be appointed "liaison counsel," holding that one qualified firm was enough, especially in light of "[t]he potential for duplicative services and the concomitant increase in attorneys' fees."⁶⁷ The court also noted that the proposed lead plaintiff group had "not offered any explanation as to what duties would be assumed by [the liaison counsel] ... why such duties could not be adequately performed by lead counsel ... [or] how the duties of the liaison counsel would not be coextensive with those of the lead counsel."⁶⁸

In order for a court to determine which of the two situations obtains in a particular case, it should conduct a probing inquiry into the proposed multiple lead counsel arrangement, and should require information beyond the typical initial submission to justify the arrangement.⁶⁹ The SEC suggests that a court "actively exercise [its] discretion to review proposals for [multiple counsel] arrangements."⁷⁰

CONSTITUTIONAL ISSUES

Courts had applied the lead plaintiff and lead counsel provisions for five years when, on February 22, 2001, Judge (formerly Professor) Robert Keeton issued an order

questioning their constitutionality, in what appears to have been the first and only case to do so.⁷¹ Two of the authors (who represented the defendants before Judge Keeton) addressed these issues in an article in the Summer 2001 issue of *Securities News*, published by the ABA Committee on Securities Litigation.⁷² In their article, the authors expressed the view that the lead plaintiff and lead counsel provisions are indeed constitutional. Judge Keeton ultimately ruled, in a decision dated June 15, 2001, that "the 90-day provision of the PSLRA is an unconstitutional intrusion on the judicial functions of a United States District Court," but did not address the other lead plaintiff and lead counsel provisions that he had questioned in his February 22, 2001 Order.⁷³ Given the isolated nature of Judge Keeton's concerns and the narrowness of his decision, further constitutional scrutiny appears unlikely.

CONCLUSION

As discussed in this article, the lead plaintiff and lead counsel provisions of the PSLRA create significant procedural and substantive requirements. While they protect plaintiffs by ensuring that truly interested individuals or entities control the litigation, they also protect defendants by making it more difficult for plaintiffs' lawyers to bring baseless, extortionate suits. It is important, then, that defendants actively participate in the lead plaintiff appointment and lead counsel selection process. Only by doing so can they ensure the vigorous application of these standards. ■

66. See *Cendant*, 182 F.R.D. at 152 (denying all motions for appointment of "liaison counsel" after finding that "[q]ualified lead counsel will be surely capable of performing [the enumerated] ministerial tasks").

67. 188 F.R.D. at 222.

68. *Id.* at 224.

69. See Vincelli, 112 F. Supp. 2d at 1318 (declining to approve a multiple firm committee as lead counsel because lead plaintiffs failed to show that "there is a low risk in the instant litigation of unnecessary and wasteful efforts by counsel," "the committee approach will not usurp control of the litigation or that the Proposed Lead Plaintiffs will not experience difficulty in controlling the instant litigation," or "the appointment of the executive committee will not lead to duplicative efforts by counsel, absence of coordination or delay, or increased costs to the Proposed Class").

70. Amicus Curiae Brief for the SEC at 3, in *In re Milestone Scientific Sec. Litig.*, 187 F.R.D. 165 (D.N.J. 1999)(No. 98-3404)(AJL), available at <http://sec.gov/litigation/briefs/milestone.txt>; see also *In re Milestone Scientific Sec. Litig.*, 187 F.R.D. 165, 176-78 (D.N.J. 1999).

71. See *Chan v. PRI Automation, Inc.*, No. 00-12398-REK, 2001 WL 263258, at *1-2 (D. Mass. Feb. 22, 2001).

72. Henn and Warneck, *The Lead Plaintiff Provisions of the PSLRA: Do They Raise Constitutional Issues*, SECURITIES NEWS (ABA Section on Litigation, Committee on Securities Litigation) Summer 2001.

73. *In re PRI Automation, Inc. Sec. Lit.*, No. 00-12398-REK, 2001 WL 726711, at *6 (D. Mass. June 15, 2001).