

I, Lucian A. Bebchuk, under penalty of perjury declare as follows:

I. INTRODUCTION AND SUMMARY

I am submitting this Declaration in support of the motion of Coughlin Stoia Geller Rudman & Robbins LLP (“Lead Counsel”) for an award of attorneys’ fees and reimbursement of expenses.

I focus on analyzing the question facing the court from an economic perspective. In particular, I analyze the incentives created by the type of fee arrangement under consideration and by alternative judicial approaches to approving such an arrangement.

In the case under consideration, the agreement between Lead Plaintiff the Regents of the University of California (“the Regents”) and Lead Counsel (“the Fee Agreement”) prescribed a fee schedule (“the Fee Schedule”) of 8% of any recovery between 0 and \$1 billion, a fee of 9% of any additional amount recovered beyond \$1 billion up to an additional \$1 billion, and a fee of 10% of any additional recovery beyond \$2 billion.¹ Thus, under the Fee Schedule, the percent of additional settlement dollars that is awarded as attorneys’ fees increases, though at a moderate slope, with the total amount of recovery.

¹ The adopted fee schedule can alternatively be described as providing a base fee of 8% of any recovery, plus an additional fee of 1% on any amount recovered above \$1 billion, plus an additional fee of 1% on any amount recovered beyond \$2 billion.

With the recovery in the case exceeding \$7.23 billion, application of the Fee Schedule yields a fee of about \$700 million (plus interest). However, it is important to recognize that such an outcome, or any outcome providing Lead Counsel with a profit, was not guaranteed at the outset when the Fee Agreement was made. At the time that the Fee Agreement was made, it was reasonable to view as possible an outcome in which application of the Fee Schedule would have provided Lead Counsel with a much lower award.

The lion's share of the recovery was obtained from investment banks. An amount of \$6.6 billion was obtained from three banks - CitiGroup, JPMorgan Chase, and Canadian Imperial Bank of Commerce. Adding the amounts obtained from Bank of America and Lehman, the amounts obtained from bankers add up to \$6.891 billion, more than 95% of the total recovery obtained.

When the Fee Agreement was made, it was not possible to rule out an outcome in which no meaningful amount would be recovered from the investment banks due to, say, a judicial ruling in favor of the banks and refusal by the banks to settle for any meaningful amount prior to this ruling. In such a scenario, without meaningful recovery from the banks, the total recovery for the class would have been much lower than it ended up being. Indeed, assuming that no recovery from the banks would have been obtained and that the settlements with other defendants would have remained the same, the total recovery in the Enron case would have been about \$250 million. Application of the Fee Schedule to such a case would have yielded a fee of \$20 million. In the

case of that outcome, applying the Fee Schedule would clearly not result in over-compensating Lead Counsel.

Thus, objections at this stage to a fee award applying the Fee Schedule are unlikely to be based on a claim that a fee award based on the Fee Schedule would not have been appropriate no matter what the outcome of the case would have been. Rather, such objections would have to rely on the fact that the case produced a high recovery amount. In particular, I will consider two claims that could be made.

First, it could be argued that, even accepting the reasonableness of a base percentage of 8% for recovery up to the \$1 billion level, the award should be based on a constant or sliding schedule – that is, the percentage of any additional recovery awarded as fees should be the same as or lower than the base percentage. On this view, a discount is warranted, or at least no additional fee should be awarded, with respect to settlement dollars obtained beyond the \$1 billion threshold.

Examining the above objection, I conclude that it was highly reasonable for the Regents to set at the outset an increasing percentage schedule. In particular, the analysis indicates that the choice of a sliding schedule or a constant schedule could have been expected to:

(i) Discourage desirable investments of time, effort, and financial resources, by Lead Counsel;

(ii) Provide Lead counsel with incentives to make undesirable settlement decisions; and

(iii) Provide Lead Counsel with incentives to make undesirable choices with respect to litigation strategy.

The second objection to the application of the Fee Schedule I will consider asserts that, even accepting the desirability of an increasing percentage formula, the 8% base percentage is too high in light of the fact that the recovery turned out to be quite high. In light of the high recovery, so the argument goes, the initial setting of 8% -- and the 9% and 10% for higher amounts that are based on it -- should be adjusted downwards.

In the case under consideration, the initial setting of these figures by a sophisticated lead plaintiff with a strong interest in maximizing recovery for the class already warrants substantial deference to this party's judgment. Going beyond the reasons for deference based on this special aspect of the Enron case, however, I discuss two considerations as to why courts should be reluctant to use the *ex post* occurrence of high recovery as a basis for downward adjustment in fee schedules:

(i) Such downward adjustment might be the product of "hindsight bias," the documented tendency of individuals to view events that take place as having been more predictable than in fact was the case; and

(ii) The prospect of such downward adjustment can be expected to provide counsel with incentives to make undesirable settlement decisions and undesirable choices with respect to litigation strategy.

I recognize that the considerations I analyze in this Declaration are not the only ones that the Court might consider in connection with the application for attorneys' fees, and I do not attempt to provide a comprehensive analysis of all such considerations. Rather, I focus on analyzing the issues noted above because I view them as important and ones that should be given significant weight.

The remainder of this Declaration is organized as follows. Section II describes my qualifications. Section III analyzes the adverse effects of non-increasing schedules (both sliding schedules and constant schedules) in which the fee percentage applying to extra amounts of recovery is not higher than the percentage applied to the first dollars of recovery. Section IV analyzes the problems involved in a judicial approach allowing for downward adjustment of the fee schedule in the event that the recovery turns out to be high.

II. QUALIFICATIONS

I serve as the William J. Friedman and Alicia Townsend Friedman Professor of Law, Economics, and Finance, and Director of the Program on Corporate Governance at Harvard Law School. I am also a Research Associate of the National Bureau of Economic Research, a Fellow of the American Academy of Arts and Sciences, an Inaugural Fellow of the European Corporate

Governance Institute, and the President of the American Association of Law and Economics. The views expressed in this Declaration are my own and should not be attributed to any of the institutions with which I am affiliated.

I received my graduate economics training in the Harvard Economics Department, obtaining an M.A. and Ph.D. in economics. I also received training in law, obtaining an LL.B. from the University of Tel-Aviv and an LL.M. and an S.J.D from Harvard Law School.

I have expertise in the economic analysis of corporate law. The citation accompanying my induction to the American Academy of Arts and Sciences described me as “One of the nation’s leading scholars of law and economics, he has made major contributions to the study of corporate control, governance, and insolvency.”

I also have expertise in the economic analysis of litigation and settlement. My research on litigation and settlement under imperfect information provided an analytical framework that has been widely used by researchers in the past two decades. My work in this area also included research on counsel incentives under alternative fee arrangements and the compensation of lead counsel in class action cases.

I have published more than seventy-five academic research articles. My work has been published in leading journals in economics and finance, including the *Quarterly Journal of Economics*, the *Journal of Finance*, and the *Journal of Financial Economics*. My work has been also published in leading law reviews, including

the *Harvard Law Review*, the *Yale Law Journal*, the *Stanford Law Review*, the *University of Chicago Law Review*, and the *Columbia Law Review*. My studies in this area have been cited in leading judicial opinions on corporate decisions, such as the *Unitrin* and *MM Companies* decisions of the Delaware Supreme Court and Judge Posner's decision in *Dynamics*. My publications are listed in my CV which is attached as Appendix A.

My research has been widely recognized both inside and outside academia. I have testified before the Finance Committee of the United States Senate and the Financial Services Committee of the House of Representatives. My research has been the subject of articles appearing in, among others, the *Wall Street Journal*, the *New York Times*, the *Financial Times*, the *Economist*, *Business Week*, and the *Washington Post*. I was included in the 2005 list of "100 Most Influential People in Finance" compiled by *Treasury & Risk Management* and the 2007 list of "100 Most Influential People in Corporate Governance" compiled by *Directorships*.

II. THE ADVERSE CONSEQUENCES OF NON-INCREASING FEE SCHEDULES

A. Determining the Slope of the Fee Schedule

In a securities class action, the class interests are best served if the fee schedule is set, and its slope is determined, so as to provide desirable incentives for lead counsel. When a lead plaintiff makes a fee agreement at the outset,

assessing which fee schedule provides the most desirable incentives should be an important consideration. And when a court reviews such an agreement at the end of the litigation, the incentives provided by the schedule should be an important consideration in assessing its reasonableness.

Of course, at this point in the life of the case under consideration, significant results are already in, and incentives seemingly no longer matter with respect to the recovery already obtained. But viewed from the appropriate *ex ante* perspective, incentives are critical. The *ex ante* perspective recognizes that the recovery at the end of the case is a product of the incentives provided to counsel earlier on by counsel's expectations of an appropriate award of attorneys' fees. And for counsel to have expectations providing desirable incentives, courts have to make *ex post* approval decisions that are consistent with such expectations.

I therefore proceed to examine the nature of the fee schedule that is optimal in terms of the incentives generated for counsel. In particular, taking as given the choice of a base percentage for the initial amount of recovery, I will analyze the choice between having a schedule that is sliding, constant, or increasing – that is, having the percentage (if any) awarded to counsel from additional amounts of recovery lower than, equal to, or higher than the base percentage.

In this analysis of the choice between a sliding schedule, a constant schedule, and an increasing schedule, we can put aside the question of how generous overall the fee arrangements should be. The reason for this is that a

constant or increasing schedule is not necessarily more generous to class counsel than a sliding schedule. In many cases, for any given expected level of compensation for counsel that is to be set, a choice remains among schedules of different slopes that would provide the given level of expected compensation. And the analysis below focuses on this choice among the schedules of different slopes that can yield the same level of expected compensation but might significantly differ in terms of the incentives they generate.

In examining the effects of alternative slopes on incentives, attention should be paid to three different sets of decisions by class counsel: (i) decisions by counsel as to what investments of time, effort, and financial resources to make, (ii) decisions by counsel with respect to settlement proposals, and (iii) choices of a litigation strategy. As the analysis shows, a sliding schedule or a constant schedule adversely affect all three types of decisions, and incentives with respect to each type of decision will be best provided by an increasing schedule. Thus, in a case in which one or more of these three types of decisions could be significant, incentive considerations call for using an increasing schedule.

In analyzing incentive effects, it is useful to illustrate points with a concrete example. Consider a case in which the base percentage is set at 10% of any amount up to \$1 billion. The question that will be asked is how incentives are affected by applying a percentage lower than 10%, equal to 10%, and higher than 10% to amounts obtained beyond the \$1 billion level.

B. Incentives to Invest Time, Effort, and Financial Resources

(i) In General

The outcome of cases often depends on counsel's investments of time, effort, and financial resources. Indeed, inducing such investments is a key reason why tying the compensation of counsel to the outcome of the case is viewed as desirable. Thus, it is important to consider how the slope of the fee schedule affects the goal of inducing valuable investments of time, effort, and financial resources by counsel.

Note that the Enron case was clearly one in which inducing substantial investments by Lead Counsel was important to enhancing the amount of recovery by the class. Of course, even with little investment, Lead Counsel could have obtained some low positive amount in return for settling all claims against all defendants. But merely recovering some positive amount would not have been in the interest of the class and Lead Plaintiff. The interest of the class was to receive a substantial amount that would fully reflect the value of its case against defendants, and achieving such full value required a substantial investment of time, effort, and financial resources on the part of counsel. Thus, the question arises as to how the incentives to make such investments would have been affected by alternative choices with respect to the slope of the fee schedule.

It is commonly and reasonably assumed that, like many other types of investments, investments in developing a case have a diminishing marginal productivity. That is, even though making additional investments raises the

expected recovery, the marginal productivity of additional investments declines as total investment increases. Because initial investments are likely to be channeled toward the most valuable and critical uses of such investments, additional investments are likely to be channeled to uses that are not as valuable and critical. Because the marginal benefit tends to decline at higher levels of investment, the amount of investment that is needed to produce additional settlement dollars tends to be higher (per dollar obtained) than the amount of investment needed to produce the first settlement dollars.

In such circumstances, a sliding schedule has it backwards. A sliding schedule provides counsel with a higher percentage of those initial settlement dollars that are relatively easy to obtain -- and with a lower percentage of those dollars at high settlement levels that are relatively more difficult to extract. The sliding schedule thus concentrates the "firepower" of incentives in exactly the wrong places. Most importantly, a sliding schedule "under-spends" compensation dollars on providing counsel with incentives to obtain extra dollars beyond the easy-to-obtain settlement sums, thereby failing to attain some of the extra dollars that more effective incentives could produce.

The very reasons why a sliding schedule would be counter-productive also indicate that the goal of inducing investments by counsel would best be served by an increasing schedule. Such a schedule spreads compensation dollars more in line with where they are needed to induce such investments. An increasing schedule spends more compensation dollars on the additional

settlement dollars at higher settlement values that are relatively more difficult to achieve and for which stronger incentives can make a significant difference.

(i) Illustration

Consider our example of a case in which the base percentage is set at 10% up to \$1 billion and the question is what fee percentage to apply to marginal recoveries above \$1 billion. Suppose that counsel can create a 25% chance of a \$1 billion settlement with a relatively small investment of \$10 million, and that counsel can create a 25% chance of getting another \$1 billion with an additional investment of \$30 million. This assumption reflects the marginal productivity of investments by counsel: whereas an investment of \$10 million is needed to produce the first \$250 million of expected recovery (25% chance of first \$1 billion), an additional investment of \$30 million is necessary to obtain the second \$250 million in expected recovery (25% chance of additional \$1 billion).

In this example, no matter what percentage fee is applied to additional settlement dollars beyond \$1 billion – that is, even if this percentage fee is set at 0 -- counsel will have sufficient incentive to make the initial \$10 million investment. Because this investment will produce an expected settlement amount of \$250 million, the base percentage element will by itself provide counsel with an expected fee of \$25 million. Assuming that counsel is not extremely risk-averse, counsel will find making the initial investment worthwhile. The question, however, is whether counsel will have an incentive to make the additional \$30

million investment, and here the choice of the percentage fee for settlement amounts beyond \$1 billion becomes important.

In the example under consideration, if a sliding schedule or a constant schedule is chosen – that is, if the percentage fee applied to additional recovery beyond \$1 billion is set at the base 10% level or lower – counsel will not have an incentive to make the additional \$30 million investment. While this additional investment will produce for the class an additional \$250 million in expected recovery, the additional expected fee produced thereby will not exceed \$25 million (10% of \$250 million) and thus fall below the cost of counsel’s additional investment.

The problem is that the additional \$30 million investment comprises 12% of the additional expected recovery it would produce. Because a non-increasing schedule would apply the base percentage level of 10% to this additional expected recovery, which is relatively more difficult to obtain, it would not provide counsel with incentive to make this additional investment. In our example, to induce the additional investment, the percentage applying to additional amounts recovered beyond the first \$1 billion would have to exceed 12%. The precise extent to which this percentage would have to exceed 12% depends on counsel’s level of risk-aversion.

Because an increasing fee schedule is necessary to induce valuable investment by counsel, setting such a schedule, rather than a sliding schedule or constant schedule, will make the class significantly better off even though it will

produce higher attorneys' fees. If a constant 10% is applied to amounts exceeding the \$1 billion level, counsel will make only the initial \$10 million investment, the expected recovery will be \$250 million, and the expected net recovery to the class will be \$225 million (90% of \$250 million). In contrast, if a 15% fee is applied to amounts exceeding \$1 billion, and counsel consequently makes the additional investment of \$30 million, the expected recovery will be \$500 million, the expected fee will be \$62.5 million (10% of the initial expected recovery of \$250 million plus 15% of the additional expected recovery of \$250 million), and the expected net recovery to the class will be \$437.5 million (\$500 million minus \$62.5 million), a significantly superior result for the class.

Thus, in this case, compared to a sliding schedule or a constant schedule, using the increasing schedule will almost double the expected net recovery to the class, increasing it by \$212.5 million. To be sure, the increasing schedule will require paying counsel 15%, rather than 10% or less, of the second \$1 billion in recovery. However, the additional recovery will not be produced without an increasing fee schedule, and getting 85% of this additional expected recovery is better than getting nothing more than the initial expected recovery.

C. Settlement Decisions

In addition to the incentives counsel has to invest time, effort, and financial resources, there are other types of incentives that matter. In particular, it is desirable to provide counsel with incentives to make "qualitative" decisions

that are in the interest of the class. One important type of such decisions concerns settlement offers.

In the course of class litigation, counsel commonly makes decisions affecting whether, and at what terms, the case is settled. While a settlement requires approval by lead plaintiff and the court, lead counsel plays a key role in screening, developing, negotiating, and recommending the approval of settlement proposals. Because the various ways in which lead counsel affects settlement decisions cannot be perfectly monitored, it is important to provide counsel with incentives to make settlement decisions that serve the interests of the class.

As explained below, any sliding schedule or a constant schedule – that is, any fee schedule that does not increase with the settlement amount – will fail to align the interests of counsel and the class with respect to settlement decisions. In particular, under such schedules, counsel will have distorted incentives inducing it to favor acceptance of some settlement offers whose acceptance would not serve the interests of the class.

Consider the example in which the fee is 10% of any recovery up to \$1 billion and the question is what fee percentage to apply to additional settlement amounts beyond \$1 billion, and suppose that class counsel receives a given settlement offer. Suppose also that counsel estimates at this time that, in the event the settlement offer is rejected, litigation will continue for another year and the outcome then will be either a recovery of \$1.5 billion (the good outcome) or a

recovery of \$0.5 billion (the bad outcome), with each outcome having an equal likelihood. Thus, in the event the offer is rejected and litigation continues, the expected recovery will be \$1 billion.

Whether counsel will favor rejecting any settlement offer below the \$1 billion level of expected recovery in the event of continued litigation, however, depends on the fee schedule. Under a sliding schedule, there will be a range of offers below \$1 billion whose acceptance will be in the interests of counsel. To see this, suppose that the fee for additional settlement amounts beyond \$1 billion is set at 8%. In this case, rejection of the settlement offer will provide counsel with an expected fee of \$95 million: \$50 million in the 50%-probability event of a \$0.5 billion recovery, and \$140 million in the 50%-probability event of a \$1.5 billion recovery. With rejection of the offer resulting in an expected fee of \$95 million, acceptance of any settlement offer in the range between \$0.95 billion and \$1 billion will be in the interest of counsel, even though acceptance of such an offer would not be in the interests of the class, as any such offer will provide counsel with a fee exceeding \$95 million.

The intuition behind this conclusion is as follows. In accepting a settlement offer slightly below \$1 billion, the class will avoid the 50%-probability downside risk of a \$0.5 billion recovery (the bad outcome) but will also forgo the 50%-probability upside opportunity of a \$1.5 billion recovery (the good outcome). Under the sliding schedule, lead counsel will be asymmetrically affected by upside and downside uncertainty: counsel will bear 10% of the loss to

the class on the downside, but will capture only 8% of the gain to the class on the upside. As a result, even if the upside to the class from rejecting the settlement offer is somewhat greater than the downside and such rejection is thus desirable from the perspective of the class, the interests of counsel might favor acceptance of the offer.

Turning to the constant percentage schedule under which the base 10% percentage is applied also to settlement amounts beyond \$1 billion, counsel will capture the same percent of gains to the class on the upside as the percent of losses to the class borne by counsel on the downside. However, while the constant percentage schedule thus will not on its own introduce a bias in favor of accepting settlement offers, it will fail to align the interests of class and counsel with respect to settlement decisions. In particular, a constant percentage schedule fails to counter two factors that operate to provide counsel with incentives to accept some settlement offers whose acceptance would not be in the interests of the class.

One factor that would produce a pro-settlement distortion under the considered 10% constant percentage schedule is the fact that continued litigation would require, and settling would avoid, extra work on the part of counsel. Consider our example in which rejection of the settlement offer would produce an expected recovery of either \$1.5 billion or \$0.5 billion after an additional year of continued litigation, and suppose that this year of continued litigation would require an investment of an additional \$20 million in time and effort on the part

of counsel. In this case, even though counsel's expected fee will be equally affected by increases and reductions in the expected recovery for the class, the \$20 million cost to counsel of continued litigation will make it preferable from counsel's perspective to accept some settlement offers whose rejection would create a larger upside than downside in terms of expected recovery for the class. In particular, it can be shown that it will be in the interest of counsel to accept any settlement offer above \$800 million, even one falling considerably below the \$1 billion expected recovery in the event of continued litigation. ²

The second factor that could produce a pro-settlement distortion under the considered 10% constant percentage schedule is the risk-aversion of counsel. Risk-aversion operates to provide counsel with incentives to favor a settlement offer below the expected recovery in the event of continued litigation in order to avoid the risk-bearing costs involved in such continued litigation. Consider our example in which rejection of the settlement offer would produce an expected recovery of \$1.5 billion or \$0.5 billion after an additional year of continued litigation, and suppose for simplicity that this year of continued litigation would not require any additional investment of time and effort on the part of counsel. In this case, a risk-averse counsel could still prefer the certainty of a \$90 million fee

² Although continuing to litigate would produce an expected recovery of \$1 billion and thus an expected fee of \$100 million (10% of \$1 billion), the expected value of the fee net of the required \$20 million additional investment would be only \$80 million. Because any settlement above \$800 million would provide counsel with a fee of more than \$80 million with no additional costs, continued litigation would not be in the interest of counsel even though it would be preferable for the class.

in the event of a \$900 million settlement over the fifty-fifty ticket of getting either a \$50 million fee or a \$150 million fee in the event of continued litigation.

The potential distortion resulting from counsel risk-aversion could have been expected by the parties making the Fee Agreement to be especially significant in the Enron case. The larger the stakes, the greater the extent to which risk-aversion considerations can be expected to influence the behavior of counsel. And the stakes in the Enron case were relatively substantial even for Lead Counsel, the largest law firm representing investors in such cases.³

Given that even a constant percentage schedule leaves counsel with incentives to favor some settlement offers whose rejection would be in the interest of the class, an increasing percentage schedule is necessary to align the interests of counsel and the class with respect to settlement decisions. Providing counsel with a higher percentage of the upward side that continued litigation could produce is necessary to counter the pro-settlement bias introduced by the additional costs -- in terms of time, effort, and financial resources as well as risk-bearing costs -- which continued litigation would impose on counsel. The steepness with which the increasing percentage schedule should climb to accomplish fully the desired incentive effects depends on the magnitude of the

³ Of course, counsel's risk-aversion leads to a divergence from the interests of the members of the class only to the extent that class members are not as risk-averse as counsel with respect to the outcome of the case. In securities class actions in which investors suffering the greatest financial losses are institutional investors, money managers, and individuals holding portfolios of securities, this seems to be the case.

two identified factors producing a pro-settlement bias even under a constant percentage schedule.

D. Litigation Strategy Decisions

Other “qualitative” choices that counsel often faces are decisions with respect to litigation strategy. During the class action litigation, counsel might well face “strategic” choices between alternative paths and approaches to pursue (e.g., which issues to emphasize, which claims and legal theories to advance, which legal risks to take, etc.). Such decisions, which might considerably influence the expected recovery to the class, are also ones that are difficult for courts to monitor perfectly. Accordingly, it is desirable to align the interests of counsel and the class as much as possible also with respect to these decisions.

As explained below, analysis of this issue involves similar considerations to those involved in the preceding analysis of settlement decisions. Under a sliding fee schedule or a constant percentage fee schedule, counsel’s interests will favor choices of a “conservative” legal strategy more than would be optimal from the perspective of the class. An increasing percentage schedule is necessary to align the interests of counsel and the class with respect to choices of legal strategy.

To illustrate, consider our example in which the base percentage is set at 10% for any recovery up to \$1 billion, and suppose that counsel has to make a choice between a “risky” strategy and a “conservative” one. The risky strategy

would produce a 50% chance of a \$1.5 billion recovery and a 50% chance of a \$0.5 billion recovery. In contrast, the conservative strategy would involve no such uncertainty, but rather produce a certain payoff.

Using an analysis similar to the one carried out earlier with respect to settlement decisions, it can be shown that a sliding fee schedule could lead counsel to favor the choice of the conservative strategy even if the strategy would produce a payoff below the \$1 billion level of the expected recovery from the risky strategy. The reason for this conclusion is that, under a sliding fee schedule, counsel would capture a smaller percentage of the gains to the class from the upside of the risky strategy than the percentage that counsel would have to bear of losses to the class from the downside involved in the risky strategy.

While a constant percentage schedule applying the same percent to any settlement dollars will not on its own produce such a bias resulting from asymmetry between the effect of increases and reductions in recovery on attorneys' fees, such a schedule fails to align the interests of counsel and the class with respect to the choice of litigation strategy. To be sure, under a constant percentage schedule, the expected compensation to counsel under any given strategy will depend only on the expected recovery under the strategy. However, under such a schedule, choices could well still be distorted by the risk-aversion of counsel.

Risk-aversion of counsel, which is especially likely to be significant in a case with substantial stakes like Enron, will operate under a constant percentage

schedule to introduce a bias in favor of conservative strategies. A risk-averse counsel might prefer a conservative strategy over a 50% chance of a \$1.5 billion recovery (and a \$150 million fee) and a 50% chance of a \$0.5 billion recovery (and a \$50 million fee) even if the certain payoff produced by the conservative strategy is below the \$1 billion level (and the fee is thus below \$100 million).

Given that counsel will have incentives to favor a conservative strategy under a constant percentage schedule, an increasing percentage schedule is necessary to align fully the interests of class counsel and the class with respect to choices of litigation strategy. Providing counsel with a higher percentage of the upward side that a risky strategy would produce can counter the conservative bias that otherwise would distort such strategic decisions. The steepness with which the fee schedule should climb to produce an alignment of counsel and class interests depends on the magnitude of the bias produced by counsel risk-aversion that the increasing slope has to counter.

IV. DOWNWARD ADJUSTMENTS OF FEE PERCENTAGES WHEN RECOVERY IS LARGE

Having concluded that it was highly reasonable for the Regents to agree to an increasing Fee Schedule, I now turn to a second possible objection to application of the Fee Agreement. According to this objection, accepting the increasing percentage nature of the Fee Schedule, one could still question the level of the

chosen schedule, that is, the percent figures used in it. In particular, it could be argued that even though the specified percentage figures would be unobjectionable in the event of, say, a \$1 billion recovery, they should be viewed as having been excessively set, and should be adjusted downward, now that counsel has obtained a recovery exceeding \$7 billion.

The fact that the Fee Schedule was negotiated by a sophisticated party with a strong interest in maximizing the value obtained by the class provides by itself a strong reason not to override the choices made by this party. Lead Plaintiff lost almost \$150 million in the Enron case and has a strong interest in obtaining a recovery for the class that is as large as possible. However, putting aside this special aspect of the Enron case, I would like to discuss two additional reasons why, in general, courts should be reluctant to use a high recovery as grounds for *ex post* downward adjustment of the initially set percent figures established in agreements between a lead plaintiff and a lead counsel.

A. The Problem of Hindsight Bias

As noted in the introduction, when the Fee Agreement was made, a final outcome with a low recovery could not have been ruled out and could have been reasonably expected by the parties. Similarly, a final outcome with a high recovery also could not have been ruled out. The Fee Agreement made by the Regents and Lead Counsel reflected their assessment of the probability distribution of possible outcomes given the information available at the time. The

argument for downward adjustment at this stage is that the high recovery suggests that the likelihood of such a recovery was in fact higher in the first place than was appreciated by the Regents and factored into their decision to negotiate and adopt the Fee Agreement.

But the fact that the outcome turned out to be high does not indicate that such an outcome had a high likelihood when the Fee Agreement was made. Outcomes that have a low likelihood do occur, and thus it is not possible to infer from an event's *ex post* occurrence that it had a high probability of occurring *ex ante*.

A court considering whether the Regents' initial assessment of the class' prospects in the Enron case was reasonable should be cautious not to let its knowledge of the *ex post* outcome influence its judgment of the reasonableness of the Regents' *ex ante* choices. It is widely accepted in behavioral economics that individuals have the tendency to view outcomes taking place as having had higher odds of occurring than they in fact had before the outcomes occurred. A decision-maker trying to assess the reasonableness of choices made at a given point in time would thus do well to ignore information arriving after this given point in time.

B. Ex Post Adjustments and Ex Ante Incentives

Putting aside the issue of hindsight bias, it is important to recognize the significant adverse effect on counsel incentives that would result if courts were to allow high *ex post* recovery to serve as a basis for adjusting downward the

percent of recovery. Such a judicial approach would have an adverse effect on settlement decisions and litigation strategy decisions.

To consider this issue, let us take as given the increasing percentage structure of the fee schedule. In particular, for concreteness, let us suppose that the schedule to be used is one in which the percent of recovery beyond \$1 billion awarded as fees is higher by one quarter than the base percentage figure applied to a recovery of up to \$1 billion. And let us consider a judicial approach that would allow an *ex post* downward adjustment of the base percent figure. In particular, suppose that the base percentage figure is 10% (which means that the percentage figure for amounts beyond \$1 billion will be 12.5%), and let us consider a judicial approach that would approve this figure as long as recovery is not higher than \$3 billion, but that in the event of recovery exceeding \$3 billion would lower the base percentage figure to 8% (which means that the percentage figure for amounts beyond \$1 billion would be 10%, one quarter higher than the base percentage of 8%).

Such a judicial approach would in fact turn the fee schedule into one that practically uses a sliding schedule structure. Indeed, the schedule would become one that declines steeply when recovery crosses the \$3 billion threshold. Crossing the \$3 billion threshold would result not only in reducing the fee percentage from 12.5% to 10% for additional recovery dollars, but also in reducing from 10% to 8% the base fee percentage obtained from recovery dollars obtained prior to crossing the \$3 billion threshold. The resulting distortions would be quite severe.

To illustrate, suppose that counsel faced a choice between accepting a settlement offer and continued litigation that would after a year produce a recovery of either \$4 billion with a 50% probability or \$2 billion with a 50% probability. In this case, the expected recovery in the event of continued litigation is \$3 billion. The considered judicial approach, however, would make it in the interest of counsel to recommend acceptance of a settlement offer even if significantly less than \$3 billion is offered.

The reason for this is that this judicial approach would produce a substantial divergence between the increase in attorneys' fees produced by raising the recovery from \$3 billion to \$4 billion and the decrease in attorneys' fees produced by reducing the recovery from \$3 billion to \$2 billion. As long as the recovery does not cross the \$3 billion threshold, the considered approach would apply 10% to the first \$1 billion and 12.5% to amounts obtained above \$1 billion, and the attorneys' fees will consequently be \$350 million in the event of a \$3 billion recovery and \$225 million in the event of a \$2 billion recovery. In the case of a \$4 billion recovery, the downward *ex post* adjustment of the fee schedule would result in the application of 8% to the first \$1 billion and 10% afterwards, and the attorneys' fees would thus be \$380 million. Therefore, increasing the recovery from \$3 billion to \$4 billion will increase attorneys' fees by only \$30 million (3% of the increase in the recovery) while decreasing the recovery from \$3 billion to \$2 billion will reduce attorneys' fees by \$125 million (12.5% of the decrease in the recovery).

The above analysis indicates that the expected value of attorneys' fees in the event of continued litigation would be \$302.5 million (50% of \$380 million plus 50% of \$225 million). It can be calculated that, as long as the settlement offer exceeds \$2.62 billion, acceptance of the settlement offer would result in higher expected fees for counsel even though the expected recovery in the event of continued litigation would be \$3 billion.⁴ This substantial distortion might be further exacerbated by the factors of additional litigation costs and counsel risk-aversion discussed earlier. To the extent that continued litigation would require counsel to invest more time, effort, and financial resources, or bear risk-bearing costs, counsel might have an incentive to favor acceptance of a settlement offer even if the offer falls below \$2.62 billion.

Note that the considered judicial approach could well adversely affect the interests of the class even if the downward adjustment of percentages would not in fact occur. To the extent that counsel has sufficient influence on the outcome in the considered example, the case might settle for a lower amount, say \$2.5 billion, which will not lead to a downward adjustment of the fee schedule. The class will consequently end up worse off than under a judicial approach not involving a downward adjustment in the event of a recovery exceeding \$3 billion. Under a judicial approach not allowing such a downward adjustment,

⁴ Accepting a settlement offer of \$2.62 billion would produce attorneys' fees of \$302.5 million (10% of \$1 billion plus 12.5% of \$1.62 billion). Thus, accepting any settlement offer exceeding \$2.62 billion would produce attorneys' fees exceeding the expected value of attorneys' fees in the event of continued litigation.

counsel's incentives will lead either to continued litigation (with a \$3 billion expected recovery) or to a higher settlement amount.

The same reasoning indicates that a judicial approach involving such a downward adjustment will not only distort settlement decisions but also litigation strategy decisions. Suppose that counsel faces a choice between a "risky" litigation strategy that would produce a recovery of either \$4 billion with a 50% probability or \$2 billion with a 50% probability and a "safe" strategy that would produce a certain payoff. The analysis of how counsel's choice can be expected to be affected by a judicial approach that adjusts fees downwards in the event of a recovery exceeding \$3 billion can proceed quite similarly to the analysis above of the choice between continued litigation and accepting a settlement offer. And the same reasoning indicates that the downward adjustment approach provides counsel with incentives to favor the safe strategy even if this strategy would produce an expected recovery substantially below \$3 billion and thereby make the class worse off.

I declare under the penalty of perjury that the above statements are true and correct to the best of my knowledge and belief. Executed on this 13th day of November 2007.



Lucian A. Bebchuk

APPENDIX A

Appendix A

Curriculum Vitae

LUCIAN A. BEBCHUK

Updated October 2007

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Current Position:

William J. Friedman & Alicia Townsend Friedman Professor of Law, Economics, and Finance, and Director of the Program on Corporate Governance, Harvard Law School

Education:

B.A. (Summa Cum Laude) (Mathematics and Economics), University of Haifa, 1977.

LL.B. (Magna Cum Laude), University of Tel-Aviv School of Law, 1979.

LL.M. (Master of Laws), Harvard Law School, 1980.

S.J.D. (Doctorate in Law), Harvard Law School, 1984.

S.J.D. dissertation: "Toward Undistorted Choice and Equal Treatment in Corporate Takeovers"

M.A. in Economics, Harvard University Economics Department, 1992

Ph.D. in Economics, Harvard University Economics Department, 1993

Ph.D. dissertation: "Essays in the Economics of Uncertainty, Bargaining and Organization"

Prior Positions:

Harvard Law School: Assistant Professor 1986-1988; Professor of Law 1988-1994;
Professor of Law, Economics, and Finance 1994-1998; William J. Friedman &
Alicia Townsend Friedman Professor of Law, Economics, and Finance since 1998;
Director of the Program on Corporate Governance since 2003.

The Society of Fellows, Harvard University: Fellow 1983-1985.

Other Current and Recent Affiliations:

American Law and Economics Association (President, 2007-2008, Vice-President/President-Elect, 2006-2007, Secretary-treasurer, 2005-2006, Member of the Board of Directors, 1997-1999)

American Academy of Arts and Sciences (Elected Member, 2001-)

European Corporate Governance Institute (Inaugural Fellow, 2002-)

National Bureau of Economic Research, Corporate Finance and Law and Economics Programs (Research Associate, 1995-)

Centre for Economic Policy Research (Fellow, 2001-)

Tel-Aviv University (Visiting Senior Professor by Special Appointment, 1994-)

Guggenheim Foundation Fellow (2004-2005)

Business Associations section, American Association of Law Schools (Chair, 1999-2000)

Tilburg University (Visiting professor for the purpose of delivering the first Anton Philips Lectures, 2001)

Books

Pay without Performance, Harvard University Press (2004) (with Jesse Fried).

Edited Volumes:

Corporate Law and Economic Analysis (Cambridge University Press, 1990, L. Bebchuk, ed.).

Shareholder Access to the Corporate Ballot (forthcoming, Harvard University Press, 2006, L. Bebchuk, ed.).

Published and Forthcoming Papers

2007

"The Myth of the Shareholder Franchise," 93 *Virginia Law Review* 676-732 (2007).

2006

"Federal Corporate Law: Lessons From History," 106 *Columbia Law Review* 1793-1839 (2006).

"Letting Shareholders Set the Rules," 119 *Harvard Law Review* 1784-1813 (2006).
[Selected as one of the Best Corporate and Securities Articles of 2006 and reprinted in *Corporate Practice Commentator*.]

"The Market for Corporate Law," 162 *Journal of Institutional and Theoretical Economics* 134-171 (2006). (with Oren Bar-Gill and Michal Barzuza)

"One-Sided Contracts in competitive Consumer Markets," 104 *Michigan Law Review* 827-836 (2006). (with Richard A. Posner)

"Symposium on Director Liability," 31 *Delaware Journal of Corporate Law* 1011-1045 (2006). (with Joseph Bachelder, Roel Campos, Byron Georgiou, Alan Hevesi, William Lerach, Robert Mendelsohn, Robert Monks, Toby Myerson, John Olson, Leo Strine, and John Wilcox)

2005

"The Costs of Entrenched Boards," 78 *Journal of Financial Economics* 409-433 (2005). (with Alma Cohen)

"Executive Compensation at Fannie Mae: A Case Study of Perverse Incentives, Nonperformance Pay and Camouflage," 30 *Journal of Corporation Law* 807-822 (2005).

"Executive Pensions," 30 *Journal of Corporation Law* 823-855 (2005). (with Robert Jackson)

"Pay without Performance: Overview of the Issues" 30 *Journal of Corporation Law* 647-673 (2005); 17 *Journal of Applied Corporate Finance* 8-22 (2005); *Academy of Management Perspectives* 5-24 (2006). (with Jesse Fried)

"The Growth of Executive Pay," 21 *Oxford Review of Economic Policy* 283-303 (2005). (with Yaniv Grinstein)

"The Case for Increasing Shareholder Power," 118 *Harvard Law Review* 833-914 (2005).

[Selected as one of the year's top 10 corporate and securities articles in the annual poll of corporate law professors.]

2004

"Stealth Compensation via Retirement Benefits," 1 *Berkeley Business Law Journal* 291-326 (2004) (with Jesse Fried).

"Designing a Shareholder Access Rule," 12 *Corporate Governance Advisor* 28-32 (2004).

2003

"Firms' Decisions Where to Incorporate," 46 *Journal of Law and Economics* 383-425 (2003) (with Alma Cohen).

[Selected as one of the year's top 10 corporate and securities articles in the annual poll of corporate law professors.]

"The Case for Shareholder Access to the Ballot," 59 *The Business Lawyer* 43-66 (2003).

[Reprinted in *After Enron: Improving Corporate Law and Modernizing Securities Regulation in Europe and the US* (Armour and McCahery, eds., 2006).]

"Executive Compensation as an Agency Problem," 17 *Journal of Economic Perspectives* 71-92 (2003) (with Jesse Fried).

[Reprinted in Hebrew Translation in *A \ 4 Taagidim Law Review* (2004) 3.]

"Why Firms Adopt Antitakeover Arrangements," 152 *University of Pennsylvania Law Review* 713-753 (2003).

"The Trouble with Staggered Boards: A Reply to Georgeson's John Wilcox," 11 *Corporate Governance Advisor* 17-19 (2003). (with John Coates and Guhan Subramanian)

2002

"The Powerful Antitakeover Force of Staggered Boards: Further Findings and a Reply to Symposium Participants," 55 *Stanford Law Review* 885-917 (2002) (with John Coates and Guhan Subramanian).

[Selected as one of the year's top 10 corporate and securities articles in the annual poll of corporate law professors.]

"The Questionable Case for Using Auctions to Select Lead Counsel," Symposium on Litigation, 80 *Washington University Law Quarterly* 889-899 (2002).

"Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters," 112 *Yale Law Journal* 553-615 (2002). (with Assaf Hamdani)

"On Takeover Law and Regulatory Competition," 57 *Business Lawyer* 1047-1068 (2002). (with Allen Ferrell)

"The Case Against Board Veto in Corporate Takeovers," 69 *University of Chicago Law Review* 973-1035 (2002).

"The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence & Policy," 54 *Stanford Law Review* 887-951 (2002). (with John Coates and Guhan Subramanian)

[Selected as one of the year's top 10 corporate and securities articles in the annual poll of corporate law professors and reprinted in *Classics in Corporate Law and Economics*, (J. Macey, ed., Edward Elgar Publishing, forthcoming 2008).]

"Managerial Power and Rent Extraction in the Design of Executive Compensation," 69 *University of Chicago Law Review* 751-846 (2002). (with Jesse Fried and David Walker)

[Selected as one of the year's top 10 corporate and securities articles in the annual poll of corporate law professors.]

"Does the Evidence Favor State Competition in Corporate Law?" forthcoming, 90 *California Law Review* 1775-1821 (2002). (with Alma Cohen and Allen Ferrell)
[Selected as one of the year's top 10 corporate and securities articles in the annual poll of corporate law professors.]

"Optimal Defaults for Corporate Law Evolution," 96 *Northwestern Law Review* 489-520 (2002) (with Assaf Hamdani).

"Ex Ante Costs of Violating Absolute Priority in Bankruptcy," 57 *Journal of Finance* 445-460 (2002).

2001

"Property Rights and Liability Rules: The Ex Ante View of the Cathedral," 100 *Michigan Law Review* 601-639 (2001).

"Federal Intervention to Enhance Shareholder Choice," 87 *Virginia Law Review*, 993-1006 (2001). (with Allen Ferrell)

"A New Approach to Valuing Secured Claims in Bankruptcy," 114 *Harvard Law Review* 2386-2436 (2001). (with Jesse Fried)

"New Approach to Takeover Law and Regulatory Competition", 87 *Virginia Law Review* 111-164 (2001). (with Allen Ferrell)

"Pre-Contractual Reliance," 30 *Journal of Legal Studies* 423-457, June 2001 (with Omri Ben-Shahar).

"The Overlooked Corporate Finance Problems of a Microsoft Breakup," 56 *The Business Lawyer* 459-481 (2001). (with David Walker)

[Translated into Spanish and published in 11 *Advocatus* 9-28 (2004 - II).]

"Federalism and Takeover Law: The Race to Protect Managers from Takeovers," In *Regulatory Competition and Economic Integration* (D. Esty and D. Geradin, ed., Oxford University Press) 68-94 (2001). (with A. Ferrell)

2000

"Stock Pyramids, Cross-Ownership, and Dual Class Equity," in *Concentrated Corporate Ownership*, (R. Morck, ed.), 295-315 (2000). (with Reinier Kraakman and George Triantis)

"Using Options to Divide Value in Corporate Bankruptcy," 44 *European Economic Review* 829-843 (2000).

"Ownership Structures and the Decision to Go Public," in *Concentrated Corporate Ownership*, 55-75 (2000). (with Luigi Zingales)

"Adverse Selection and Gains to Controllers in Corporate Freezeouts," in *Concentrated Corporate Ownership*, (R. Morck, ed.) 247-259 (2000). (with Marcel Kahan)

1999

"A Theory of Path Dependence in Corporate Ownership and Governance," 52 *Stanford Law Review* 127-170 (1999). (with Mark Roe)

"Managerial Value Diversion and Shareholder Wealth," *The Journal of Law, Economics, and Organization*, Vol. 15, No. 2, 487-502 (1999). (with Christine Jolls)

"Federalism and Takeover Law: The Race to Protect Managers from Takeovers," 99 *Columbia Law Review* 1168-1199 (1999). (with Allen Ferrell)
[Reprinted in *Regulatory Competition and Economic Integration* (D. Esty and D. Geradin, ed., Oxford University Press), 68-94 (2001).]

"Reconsidering Contractual Liability and the Incentive to Reveal Information," 51 *Stanford Law Review* 1615-1627 (1999). (with Steven Shavell)

"An Economic Analysis of Transnational Bankruptcies," 42 *The Journal of Law and Economics* 775-808 (1999). (with Andrew Guzman)

"Damage Measures for Inadvertent Breach of Contract," 19 *International Review of Law and Economics* 319-331 (1999). (with I. P'ng)

"The Effect of Offer-of-Settlement Rules on the Terms of Settlement," 28 *Journal of Legal Studies* 489-513 (1999). (with Howard Chang)

1998

"Negative Expected Value Suits," in *The New Palgrave Dictionary of Economics and the Law* 551-554 (1998).

"Chapter 11," in *The New Palgrave Dictionary of Economics and the Law* 219-224 (1998).

1997

"The Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to Critics," 82 *Cornell Law Review* 1279-1348 (1997). (with Jesse Fried)

1996

"An Analysis of Fee-Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11," 25 *Journal of Legal Studies* 371-403 (1996). (with Howard Chang)

"A New Theory Concerning the Credibility and Success of Threats to Sue," 25 *Journal of Legal Studies* 1-26 (1996).

"The Uneasy Case for the Priority of Secured Claims in Bankruptcy," 105 *The Yale Law Journal* 857-934 (1996). (with Jesse Fried)

"Concentration in the Israeli Economy and Bank Investment in Nonfinancial Companies," 43 *The Economic Quarterly* (1996). (in Hebrew) (with Louis Kaplow and Jesse Fried).

"How Would You Like to Pay for That? The Strategic Effects of Fee Arrangements on Settlement Terms," 1 *Harvard Negotiation Law Review* 53-63 (Spring 1996). (with Andrew Guzman)

1994

"The Effects of Insider Trading on Insiders' Choice Among Risky Investment Projects," 29 *Journal of Financial and Quantitative Analysis* 1-14 (1994). (with Chaim Fershtman)

"Efficient and Inefficient Sales of Corporate Control," 109 *Quarterly Journal of Economics* 957-993 (1994).

1993

"Do Short-Term Managerial Objectives Lead to Under- or Over-Investment in Long-Term Projects?," 48 *Journal of Finance* 719-729 (1993). (with Lars Stole)

"Optimal Sanctions and Differences in Individuals' Likelihood of Avoiding Detection," 13 *International Review of Law and Economics* 217-224 (1993). (with Louis Kaplow)

"The Effects of Insider Trading on Insiders' Effort in Good and Bad Times," 9 *European Journal of Political Economy* 469-481 (1993). (with Chaim Fershtman)

1992

"Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law," 105 *Harvard Law Review* 1435-1510 (1992).
[Reprinted in *Company Law*, (New York University Press, 1993), edited by Sally Wheeler, University of Nottingham, England, 241-314. Reprinted (translated into Japanese) in *Ryodai Law Review*, No. 50, 1993.]

"Bargaining and the Division of Value in Corporate Reorganization," 8 *Journal of Law, Economics, and Organization* 253-279 (1992). (with Howard Chang)

"Optimal Sanctions When Individuals are Imperfectly Informed about the Probability of Apprehension," 21 *Journal of Legal Studies* 365-370 (1992). (with Louis Kaplow)

1991

"Information and the Scope of Liability for Breach of Contract: The Rule of *Hadley v. Baxendale*," (with Steven Shavell). 7 *Journal of Law, Economics, and Organization* 284-312 (1991).

[Reprinted in *Economics of Contract Law*, (Douglas G. Baird, ed., Edward Elgar Publishing, 2007).]

1990

"The Debate on Contractual Freedom in Corporate Law," 89 *Columbia Law Review* 1395-1415 (1989).

[Reprinted (translated into Japanese) in 7 *Sapporo Gakvin Law Review* 89-118, (1991); and in 32 *Corporate Practice Commentator*, (F. Hodge O'Neal, ed.) 425-446 (1990).]

"A Framework for Analyzing Legal Policy Toward Proxy Contests," 78 *California Law Review* 1071-1136 (1990). (with Marcel Kahan)

1989

"Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments," 102 *Harvard Law Review* 1820-1860 (1989).

"Fairness in Opinions: How Fair Are They and What Can Be Done About It?" 1989 *Duke Law Journal* 27-53 (1989). (with Marcel Kahan)

"Takeover Bids below the Expected Value of Minority Shares," 24 *Journal of Financial and Quantitative Analysis* 171-184 (1989).

"The Debate on Contractual Freedom in Corporate Law," 89 *Columbia Law Review* 1395-1415 (1989).

1988

"A New Approach to Corporate Reorganization," 101 *Harvard Law Review*, 775 - 804 (1988).

[Reprinted in *The Economics of Corporate and Capital Markets Law* (L. Bebchuk, ed., Cambridge University Press, 1990); in 2 *The Korea Forum on International Trade and Business Law* 1993 (in Korean); and in *Corporate Bankruptcy* (J. Bhandari, ed., MIT Press, 1995).]

"The Pressure to Tender: An Analysis and a proposed Remedy," 12 *Delaware Journal of Corporate Law*, Vol., 911-949 (1987).

[Reprinted in *The Impact of the Hostile Takeover* (J. Coffee, L. Lowenstein & S. Rose-Ackerman, ed., Oxford University Press, 1988).]

"The Sole Owner Standard for Takeover Policy," 17 *Journal of Legal Studies*, 197-229 (1988).

"Suing Solely to Extract a Settlement Offer," 17 *Journal of Legal Studies* 437-450 (1988).

"Corporate Acquisitions," 13 *University of Tel-Aviv Law Review* 71 (1988) (with U. Procaccia).

1986

"The Case for Facilitating Competing Tender Offers: A Last (?) Reply," 2 *Journal of Law, Economics, and Organization* 253-271 (1986).

1985

"Toward Undistorted Choice and Equal Treatment in Corporate Takeovers," 98 *Harvard Law Review* 1695-1808 (1985).

1984

"Litigation and Settlement under Imperfect Information," 15 *Rand Journal of Economics* 404-415 (1984).

1982

"The Case for Facilitating Competing Tender Offers," 95 *Harvard Law Review* 1028-1056 (1982).

"The Case for Facilitating Competing Tender Offers: A Reply and Extension," 35 *Stanford Law Review* 23-50 (1982).

1980

"The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?" in 8 *Symposium on Efficiency as a Legal Concern, Hofstra Law Review* 671-709 (1980).

"Ignorance and Manipulation," 8 *Economics Letters* 119-123 (1980).

Recent Working Papers

"Consent and Exchange," Harvard Law School Olin Discussion Paper No. 590, July 2007. (with Oren Bar-Gill)

"Pay Distribution in the Top Executive Team," Harvard Law School Olin Discussion Paper No. 574, December 2006. (with Martijn Cremers & Urs Peyer)

"Lucky Directors," Harvard Law School Olin Discussion Paper No. 573, December 2006. (with Yaniv Grinstein & Urs Peyer)

"Lucky CEOs," Harvard Law School Olin Discussion Paper No. 566, November 2006. (with Yaniv Grinstein & Urs Peyer)

"Firm Expansion and CEO Pay," Harvard Law School Olin Discussion Paper No. 533, November 2005. (with Yaniv Grinstein)

"What Matters in Corporate Governance?" Harvard Law School Olin Discussion Paper No. 491, September 2004. (with Alma Cohen and Allen Ferrell)

"Misreporting Corporate Performance," Harvard Law School Olin Discussion Paper No. 400, November 2002. (with Oren Bar-Gill)

"Asymmetric Information and the Choice of Corporate Governance Arrangements," Harvard Law School Olin Discussion Paper No. 398, October 2002.

Op-Eds (2003-2007)

"Inside Jobs," *Wall Street Journal*, January 2007.

"'Lucky' Grants Point to Deeper Governance Malaise," *Financial Times*, December 2006. (with Urs Peyer)

"The Compensation Game," *Harvard Business School Working Knowledge*, August 2006. (with Rakesh Khurana)

"Investors Must Have Power, Not Just Figures on Pay," *Financial Times*, July 2006.

"The SEC: Beyond Disclosure," *Forbes*, January 2006.

"How Much Does the Boss Make?" *Wall Street Journal*, January 2006.

"What Corporate-Governance Reforms are Still Necessary?" *Optimize Magazine*, April 2005.

"What's \$13 Million Among Friends?" *New York Times*, January 2005.

"The Disney Verdict and the Protection of Investors," *Financial Times*, August 2005.

"Why Shareholders Must Have More Power," *Financial Times*, October 2003.

"Not-So-Fierce Rivalry" *The Daily Deal*, January 2003. (with Alma Cohen)

Law Reform (Partial):

Testified before House Financial Services Committee on Shareholder Advisory Votes on Compensation

Testified in hearing on executive compensation, Committee on Finance, U.S. Senate

Testified, Roundtable on Shareholder Access, Securities and Exchange Commission

Prepared, together with Professor Uriel Procaccia, a report for the Israeli Ministry of Justice, on reforming the Israeli law on corporate acquisitions.

Prepared together with Louis Kaplow and Jesse Fried, a report for the Israeli Finance Ministry on bank investments in non-financial corporations. The recommendations of both reports were adopted by Israeli legislation.

Served as advisor for the Israeli Government's Committee for Investigating the Role of Institutional Investors in the Capital Market.

Supervised Graduate Students and Post-Graduate Fellows:

Oren Bar-Gill (New York University)
Michal Barzuza (Virginia)
Omri Ben-Shahar (Michigan)
Eli Bukspan (IDC-Herzlia)
Howard Chang (University of Pennsylvania)
Steven Choi (New York University)
Allen Ferrell (Harvard)
Jesse Fried (Berkeley)
Andrew Guzman (Berkeley)
Assaf Hamdani (Bar-Ilan University)
Sharon Hannes (Tel-Aviv)
Douglas Harris (University of Toronto)
Christine Jolls (Yale)
Marcel Kahan (New York University)
Amir Licht (IDC-Herzlia)
Lars Stole (Chicago)
David Walker (Boston University).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing [DECLARATION OF PROFESSOR LUCIAN A. BEBCHUK](#) document has been served by sending a copy via electronic mail to serve@ESL3624.com on January 4, 2008.

I also certify that a copy of the above-mentioned document has been served via U.S. MAIL on the parties listed on the attached "Additional Service List" on this 4th day of January, 2008.

Deborah S. Granger

[DEBORAH S. GRANGER](#)

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