UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624 **(Consolidated)**
This Document Relates To:	§	CLASS ACTION
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs,	§	
vs.	§	
ENRON CORP., et al., Defendants.	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs,	§	
vs.	§	
KENNETH L. LAY, et al., Defendants.	§	

DECLARATION OF JOHN C. COFFEE, JR.

JOHN C. COFFEE, JR., under penalty of perjury, declares as follows:

I. **Introduction**

1. I submit 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. At the outset, I should acknowledge that my writings over more than twenty-five years have frequently been critical of the performance of plaintiff's attorneys in class actions, and particularly in securities class actions. In particular, I have suggested that securities class actions often fail to produce a net benefit for the shareholder class because of the essential circularity of the securities class action, with the investor class typically bearing the cost of the corporation's liability, while those most responsible for the fraud escape serious liability. See John C. Coffee Jr., Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev. 1534 (2006). But even a critic must recognize that this case is a complete and exemplary exception to such a generalization. Its costs and the recovery do not fall on Enron (or on its shareholders indirectly); rather, the recovery has been largely funded by the financial institutions that enabled Enron to inflate its financial statements. To a relatively unique degree in securities litigation, the recovery has been placed on those who are culpable, and the level of the recovery in this case is record-setting and unprecedented.

2. Put simply, this is a litigation that can only be described in superlatives. To begin with, it represents the largest recovery ever in any class action—not just securities class actions, but all class actions. Even more impressively, this record recovery was achieved in the face of exceptional hurdles, both because of (a) the bankruptcy of the corporate issuer (i.e., Enron), and (b) the inability of the proposed class

to achieve certification. Normally, in Rule 10b-5 litigation, the class obtains the bulk of its recovery from the corporate issuer, with most of the balance, if any, coming from the accounting firm that audited the issuer's financial statements. But here, from the outset, Enron was bankrupt and Arthur Andersen was on the brink of insolvency and clearly could not fund more than a small portion of the recovery. Moreover, with a critical issue unresolved—i.e., class certification—it was not surprising that some of the largest defendants with the greatest potential liability declined to settle and held out. That an all-time record was achieved on these facts strongly suggests that Lead Counsel performed with an extraordinary level of skill and negotiating prowess.

3. Although the Enron litigation received great media and public attention, this did not make it an easy case to resolve or settle—indeed, it was just the reverse. Because of its notoriety, Enron could not have been settled as a practical matter for a modest amount, even if such a recovery accurately reflected the high odds facing plaintiffs' counsel in their litigation against basically secondary participants. Thus, this was a legally challenged case from the outset, principally because of the absence of an issuer or other presumptively liable defendant with deep pockets. Although major financial institutions were sued, they had (for the most part) not made any "attributed statements," and so they could plausibly assert that they had at most aided and abetted the fraud (which conduct cannot result in liability in private litigation under Rule 10b-5). See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994). In response, Lead Counsel creatively fashioned a new legal theory—"scheme to defraud" liability—using subparagraph (a) of Rule 10b-5. Armed only with this ingenious, but untested, theory, Lead Counsel was able over time and persistent

negotiation to convince three defendants, who had initially assumed that they were immune from liability under Central Bank, to contribute over \$6.6 billion of this \$7.23 billion settlement. Viewed from an objective distance, this was an extraordinary negotiating success, achieved without any contemporaneous appellate federal court decision endorsing Lead Counsel's "scheme to defraud" theory. Even today, "scheme to defraud" liability is a legal theory that has been rejected by more appellate courts than have accepted it, and its fate currently hangs in the balance before the Supreme Court. See Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 443 F.3d 987 (8th Cir. 2006), cert. granted, 127 S. Ct. 1873 (2007). Although the Fifth Circuit rejected the "scheme to defraud" theory (wrongly and prematurely in my personal judgment), this only underscores Lead Counsel's success at negotiation. Lead Counsel was able to induce some of the largest, most sophisticated financial institutions in the world to settle for record amounts, based on a novel theory that other plaintiff's counsel might have overlooked or been unable to articulate convincingly. To be sure, some large institutions held out and did not settle—but that only underlines that the risk was real. Unlike other recent "mega fund" cases—most notably WorldCom—Lead Counsel lacked the overwhelming legal leverage in this case that compelled the defendants in WorldCom to settle.

4. Viewed as a negotiation, this was arguably the highest stakes legal poker game ever played. Three sophisticated financial institutions were convinced to settle for an amount in excess of \$2 billion each, based largely on a legal theory that the Fifth Circuit ultimately rejected. See Regents of the Univ. of Cal. v. Credit Suisse First Boston, 482 F.3d 372 (5th Cir. 2007). Few, if any, other plaintiff's counsel in my judgment could

have pulled off such a tour de force, and some might have been willing to settle for a small fraction of the recovery here obtained. That Lead Counsel succeeded is attributable in almost equal measure to its credibility, creativity and the intensity of its commitment to this case. In my judgment, Lead Counsel is the adversary most feared today by the defense bar in securities litigation, and that reputation played an important role here.

5. In particular, Lead Counsel demonstrated its commitment by essentially risking its own time and money on a novel legal theory, with little precedent to support it, in a case that initially seemed both financially unpromising and difficult to settle. Indeed, this record $7,227,000,000 settlement would simply not have happened but for Lead Counsel's willingness to accept high risk. Few other plaintiff's law firms could have afforded the costs of litigating and funding this action, which in total has consumed approximately 280,000 hours of time expended by the plaintiffs' attorneys and resulted in an aggregate lodestar of over $127.5 million. In addition, Lead Counsel advanced over $45 million in expenses. In all likelihood, this represents the largest investment ever made in a single securities class action. More importantly, this investment of time and money was not made by a broad consortium of plaintiffs' firms, all sharing the risk. Rather, of the total lodestar, which I understand to be in excess of $127.5 million, the Coughlin Stoia firm (and its predecessors) accounted for over $112 million of this amount (or nearly 90%). This was an extraordinary investment for one firm to make, but it also permitted this action to be run more efficiently without the duplication and delay that a broad consortium of firms usually entails. As this Court well understands, these expenditures were made by Lead Counsel entirely at its own risk, without any promise or hope of reimbursement unless it were successful in high stakes and high risk litigation.

Without these expenditures and Lead Counsel's commitment to this case, even the most creative legal theory would not have faced defendants with a sufficient prospect of high liability to have induced sophisticated defendants to make serious settlement offers before the issue of class certification had been resolved. My point is that, even if other counsel could have developed the same original legal theory (and this is uncertain), only a law firm with Lead Counsel's reputation for zealous advocacy could have convinced the defendants that this case would be carried to trial (at whatever cost it took) and represented too great a risk at trial for them not to settle. In addition, Lead Counsel was litigating literally against the cream of the American corporate law bar. Virtually every major securities law firm was representing at least one defendant in this case, and defendants had retained many of the leading authorities as their expert witnesses. As a result, the burden of this litigation (at least from the plaintiff's perspective) was also exceptional. As detailed in the Declaration of Helen Hodges, the various defendants constantly made motions that could have been dispositive, and all had to be resisted by a relatively small and vastly outnumbered team of plaintiff's counsel. To sum up, in my judgment, few other counsel (and perhaps no other) could have obtained this degree of success.

6. Much attention has recently focused on abuses in class actions. Precisely for this reason, it is important to note that this case illustrates the best practices in class actions. Indeed, this action has been a model of transparency. Lead Counsel here negotiated a fee agreement at the outset in a careful, deliberative manner with The Regents of the University of California ("The Regents"), as Lead Plaintiff. Such a practice maximized accountability. Although such fee agreements are today not

uncommon, they rarely involve parties as sophisticated as those in this case or a fee formula as carefully thought out as the increasing percentage of the recovery formula adopted in this case. Here, it is clear that The Regents sought to craft a fee formula that would incentivize their counsel to assume the enormous risks in this case over a potentially indefinite period. The outcome—a record settlement—is convincing evidence that The Regents succeeded. The Regents continue to be satisfied with the deal they struck (as well they should be), even though, as a politically accountable body, they would be subject to intense public criticism if it appeared that they had authorized a windfall. Given the reliance placed by the Private Securities Litigation Reform Act of 1995 (the "PSLRA") on lead plaintiffs, I believe The Regents' judgment should be entitled to considerable weight and some deference. Moreover, as discussed later, The Regents chose a logical and sensible formula that encouraged Lead Counsel to make the extraordinary commitment to this case that produced a record settlement. For all these reasons, I would urge this Court to give presumptive weight to The Regents' judgment (although I do recognize that it is this Court's responsibility to determine that any fee award approved by it falls within a range of reasonableness). Most importantly, I further urge this Court to recognize that this case shows what is right about contemporary class action practice, not what is wrong. Everything about its conduct was transparent, open, and accountable.

7. Ultimately, the role of an expert witness in a class action fee determination is modest. The ultimate decision, of course, belongs to the Court. But expert testimony can inform the court by pointing out relevant comparisons and empirical data. In this Declaration, I will principally focus on three critical areas: (1) the degree of success

obtained; (2) the level of risk assumed; and (3) the logic and sensible public policy underlying the fee agreement struck between the Regents and Lead Counsel. Initially, Part II of this Declaration will discuss my background and relevant experience. Part III assembles the data on the fee recoveries in other "mega-fund" cases and compares them to the size of the settlement in this case. Part IV examines the risks in this case and compares the level of success obtained to that in other securities class actions. Next, Part V sets forth a "lodestar cross-check." Part VI examines the fee agreement with the Regents in more detail. Part VII then considers public policy considerations, and Part VIII contains a summary and recommendations.

II. Background and Qualifications

8. I am the Adolf A. Berle Professor of Law at Columbia University Law School, where I have taught since 1980, and am a member of the Bars of the State of New York and the District of Columbia. I am also a Fellow of the American Academy of Arts and Sciences, a Life Fellow of the American Bar Foundation, and a member of, and former Reporter for, the American Law Institute. I have also been a Visiting Professor of Law at Harvard Law School, Stanford Law School, the University of Virginia Law School, and the University of Michigan Law School. I began my academic career teaching at Georgetown University Law School from 1976 to 1980. Prior to that, I practiced law with the firm of Cravath, Swaine & Moore in New York City from 1970 to 1976. I am a 1969 graduate of Yale Law School.

9. As a law professor, one of my principal academic interests has been class action litigation (with a special focus on the management of the large class action and the incentive structure that the law creates to reward the successful plaintiff's attorney).

Although my academic interest in class actions does not make me more able than any other competent attorney to cite relevant precedent to this Court, my research has placed me in a position to call to this Court's attention recent empirical evidence concerning class action litigation and attorney fee awards. This data has relevance because it supplies a frame of reference enabling this Court to compare the requested fee against relevant benchmarks and an appropriate sample of related cases. Thus, rather than duplicating class counsel's legal memorandum, I will focus instead on recent empirical studies regarding the typical recovery and fee award in class litigation.

10. I have on a number of occasions testified before Congressional committees with regard to the federal securities laws and class actions, have appeared as a witness before the Advisory Committee on the Civil Rules of the United States Judicial Conference, and regularly appear as a panelist at symposia and institutes on the topics of securities law and class actions, including serving for the past ten years as the principal academic lecturer at the annual ABA National Institute on Class Actions. During 1995, I served as an adviser to the White House's Office of General Counsel with regard to the Private Securities Litigation Reform Act of 1995 (which chiefly seeks to regulate securities class actions), and more recently I advised the staff of the Senate Finance Committee with respect to the drafting of the Sarbanes-Oxley Act in 2002.

11. In addition, I have authored the following articles on class actions (which I cite in part to indicate that I am not contradicting prior positions or inventing a novel argument that I would not endorse apart from the facts of this case): John C. Coffee Jr., Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev. 1534 (2006); John C. Coffee Jr., Rescuing the Private Attorney

General: Why the Model of the Lawyer as Bounty Hunter Is Not Working, 42 Md. L. Rev. 215 (1983); John C. Coffee Jr., The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation, 48 Law & Contemp. Probs. 5 (Summer 1985); John C. Coffee Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669 (1986); John C. Coffee Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877 (1987), John C. Coffee Jr., and Donald E. Schwartz, The Survival of the Derivative Suit: An Evaluation and a Proposed Legislative Reform, 81 Colum. L. Rev. 261 (1981); John C. Coffee Jr., Rethinking the Class Action: A Policy Primer on Reform, 62 Ind. L. Rev. 625 (1987); John C. Coffee Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343 (1995), John C. Coffee Jr., The Future of the Private Securities Litigation Reform Act: or Why the Fat Lady Has Not Yet Sung, 51 Bus. Law. 975 (1996); John C. Coffee Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 Colum. L. Rev. 370 (2000). Some of these articles have been cited and relied upon by other federal courts, including the U.S. Supreme Court and the Fifth Circuit, in well-known decisions dealing with class actions and attorney fee awards. See, e.g., Ortiz v. Fibreboard Corp., 119 S. Ct. 2295, 2317 n.28 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997); In re Asbestos Litig., 134 F.3d 668 (5th Cir. 1998); In Re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 801, 821 (3d Cir. 1995); Georgine v. Amchem Prods., 83 F.3d 610, 618, 636 (3d Cir. 1995).

12. My work in the area of class actions and representative litigation also includes service (for over a dozen years) as a Reporter for the American Law Institute in connection with its effort to codify the common law rules of corporate law and fiduciary duties in a Restatement-like volume. See A.L.I., PRINCIPLES OF CORPORATE GOVERNANCE: Analysis and Recommendations (1992). I served as the Reporter for Litigation Remedies, and this project specifically recommended standards for plaintiffs' attorney fee awards in direct and derivative shareholder actions. In connection with serving as Reporter for the American Law Institute, I have studied fee award procedures, met with many of the leading attorneys in the class and derivative action field, and have participated in numerous seminars, panels, and informal conferences with judges who have faced similar issues to those involved in this case.

13. I have also served as an expert witness in a number of the largest recent "mega-fund" class action cases, including Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); In re Visa Check/MasterMoney Antitrust Litig., 297 F. Supp. 2d 503 (E.D.N.Y. 2003); In re AOL Time Warner Inc. Sec. & "ERISA" Litig., No. 02 Civ. 5575 (SWK), 2006 U.S. Dist. LEXIS 78101 (S.D.N.Y. Sept. 28, 2006); In re Royal Ahold Sec. & "ERISA" Litig., 461 F. Supp. 2d 383 (D. Md. 2006); In re NASDAQ Market-Makers Antitrust Litigation, 187 F.R.D. 465 (S.D.N.Y. 1998); In re Sumitomo Copper Litig., 74 F.Supp. 2d 393 (S.D.N.Y. 1999); In re Cendant Corp. Sec. Litig., 182 F.R.D. 144 (D.N.J. 1998); In re Cendant Corp. Sec. Litig., 109 F.Supp. 2d 235 (D.N.J. 2000), aff'd 264 F.3d 201 (3d Cir. 2001); In re Lucent Tech. Inc. Sec. Litig., 327 F. Supp. 2d 426 (D.N.J. 2004); In re Waste Management, Inc. Sec. Litig., No. 97C7709 (N.D. Ill. 1999); In re Lease Oil Antitrust Litig., 186 F.R.D. 403 (S.D. Tex. 1999); Shaw v. Toshiba America

Info. Sys., 91 F.Supp. 2d 942 (E.D. Tex. 2000); and In re Diet Drugs Products Liability Litigation, MDL Docket No. 1203 (E.D. Pa. 2000).

III. THE EMPIRICAL DATA

14. There are two legitimate perspectives that can be taken on the proposed fee award formula in this case: First, at the time the agreement was struck, did it exceed the then prevailing standards for a contingent fee representation in a securities class action? That is, based on what Lead Counsel could then have known, does the proposed 8% to 10% fee agreement negotiated with the Regents look unreasonable? Second, from a current standpoint, how does this proposed fee award look in comparison to the fee awards in other "mega fund" cases? The first perspective looks ex ante at what the parties knew at the time of contracting, while the second looks at their agreement ex post in the light of all knowledge available today. Both perspectives are examined below.

A. The Ex Ante Perspective

15. As of the time, Lead Counsel and the Regents negotiated their fee agreement, only one securities class action (In re Cendant Corp. Sec. Litig., 243 F. Supp. 2d 166 (D.N.J. 2003)) had settled for over $1 billion dollars. As noted below, the traditional securities class action awarded fees in the range of 30% of the recovery. Moreover, because this case, although highly publicized, seemingly lacked a deep-pocketed defendant who could be induced to contribute $1 billion (or more) to the settlement fund (as Cendant had), it did not promise an equivalent recovery at the outset.

16. To understand how modest an 8% to 10% fee award appeared at the time this fee agreement was struck, it is useful to review the findings of the most complete analysis of fee awards in securities class actions, which has been conducted by National

Economic Research Associates ("NERA"), an economics consulting firm. See Frederick C. Dunbar, Todd S. Foster, Vinita M. Juneja, Denise N. Martin, Recent Trends III: What Explains Settlements in Shareholder Class Actions? (NERA, June 1995) (hereinafter "NERA Study"). Using data from 656 shareholder class actions that were settled, dismissed or resolved by a jury verdict between January 1991 and December 1994, the NERA Study reached a number of findings based on data that is both more current and reliable than that underlying other class action studies. On the central question of attorneys fees, this study reports:

> "Regardless of case size, fees average approximately 32 percent of the settlement." (NERA Study at 7).

17. Given the importance of this conclusion, a closer look at their data seems warranted, and an abbreviated version of Table 5 from this study is thus set forth below:

Table 1

Plaintiffs' Attorney Fees

Settlement Range	Number of Settlements	Average Attorneys Fee as a Percentage	Median Attorney Fee as a Percentage
\$0.00-\$0.99 Mil	27	30.31%	30.00%
\$1.00-\$1.99 Mil	45	31.99%	33.33%
\$2.00-\$9.99 Mil	162	31.99%	33.33%
\$10.00-\$49.99 Mil	53	31.36%	32.00%
\$50 + Million	2	31.67%	31.67%
Total or Average:	**289**	**31.71%**	**33.33%**

In short, the average fee award was then above 30% even in cases exceeding $50 million. Although current rates are probably lower (largely, I believe, because of the impact of public institutions, such as The Regents, serving as lead plaintiffs), Lead Counsel and The Regents negotiated their agreement against the above backdrop.

18. Another contemporaneous study of attorney fee awards, prepared by Vincent O'Brien of the Law & Economics Consulting Center, covered securities fraud cases from April 1988 through September 1996 and collected data from some 1280 securities class action cases. See Vincent E. O'Brien, A Study of Class Action Securities Fraud Cases, 1988-1996 (the "O'Brien Study"). Examining the period from April 1993 to September 1996, the O'Brien Study found that the average fee awarded to plaintiffs' counsel in securities cases amounted to 32% of the settlement fund (which was up from the 29% level that was the average from April 1988 to March 1993). This result is only slightly higher than the 31.7% average fee reported in the NERA Study, and seems closely consistent with that study. The O'Brien Study also reports that some other studies (whose methodology it questions) have found the average fee award to be as high as 40% of the settlement fund. (See O'Brien Study, Part III, page 2).

19. Of course, both the NERA Study and the O'Brien Study focus only on securities class actions. In that light, it may be useful to consider a wider-angled look at the data. A 1996 study by the Federal Judicial Center focused on all class actions resolved or settled over a two year period in four selected federal district courts (the Eastern District of Pennsylvania, the Northern District of California, the Southern District of Florida, and the Northern District of Illinois) and reached reasonably similar findings to the NERA Study on fee awards. See Thomas E. Willging, Laurel L. Hooper & Robert

J. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (Federal Judicial Center 1996). These four districts were chosen because each had substantial experience with, and a high volume of, class actions. Essentially, the findings in this study are very similar to those in the O'Brien and NERA studies. As to the size of attorney fee awards as a percentage of the recovery, the Federal Judicial Center Study found:

> "Median rates ranged from 27% to 30%. Most fee awards in the study were 20% and 40% of the gross monetary settlement." (Id. at 69).

Interestingly, there was very little variation among the four district courts surveyed in this study. Although geographically and demographically diverse, each district seemed to award fees within the same percentage-of-the-recovery band.

20. As a result, as of the time the Regents and Lead Counsel reached their agreement, although an exemplary recovery was certainly a possibility, no reasonable person could have seen this as an assured outcome, given the insolvency of the major defendants. If the settlement had been under or around $1 billion, then an 8% to 10% fee award would have seemed entirely reasonable under those prevailing standards, particularly in view of the fact that, as of the time the instant fee agreement was reached by Lead Counsel and the Regents, the leading decision dealing with a recovery over $1 billion (In re Nasdaq Market-Makers Antitrust Litig., 187 F.R.D. 465 (S.D.N.Y. 1998)) had awarded a 14% fee.

B. Fee Awards in "Mega-Fund" Cases

21. "Mega-fund" cases are a special category of cases that have arisen largely over the last decade. Today, it is evident that courts proceed more cautiously in awarding

fees in this context than in cases involving recovery under $100 million. Thus, it is simplest to begin with empirical data: what have courts recently done in "mega fund" cases (by which term I mean settlements exceeding $100 million).

22. The following chart lists the largest securities class action settlements involving "mega-fund" recoveries over $100 million since 1990 and their fee awards expressed as a percentage of the recovery. Because new cases are constantly being decided, this list is almost certainly incomplete, but I nonetheless believe it is representative:

Table 2: Largest Securities Class Action Fee Awards

Case	Recovery	Fees and Expenses As a Percentage of the Class Recovery
1. In re WorldCom, Inc. Sec. Litig., 388 F. Supp. 2d 319 (S.D.N.Y. 2005)	$6.133 billion	5.5% $336.1 million
2. In re Cendant Corp. Sec. Litig., 243 F. Supp. 2d 166 (D.N.J. 2003)	$3.186 billion	1.7%
3. In re AOL Time Warner Inc. Sec. & "ERISA" Litig., No. 02 Civ. 5575 (SWK), 2006 U.S. Dist. LEXIS 77926 (S.D.N.Y. Oct. 25, 2006)	$2.5 billion	6.0% $147.5 million plus $3.4 million in expenses
4. In re Royal Ahold N.V. Sec. & "ERISA" Litig., 461 F. Supp. 2d 383 (D. Md. 2006)	$1.1 billion	12% $130.6 million
5. In re Washington Public Power Supply Systems Sec. Litig. (WPPSS), 779 F. Supp 1063 (D. Ariz. 1990)	$687 million	5.2%
6. In re Lucent Techs. Inc. Sec. Litig., 327 F. Supp. 2d 426, 442 (D.N.J. 2004) and 307 F. Supp. 2d 633 (D.N.J. 2004)	$517 million	17%
7. In re Bankamerica Corp. Sec. Litig., 228 F. Supp. 2d 1061 (E.D. Mo. 2002)	$490 million	18%

8. In re Dynegy, Inc. Sec. Litig., No. H-02-1571 (S.D. Tex. July 8, 2005)	$474 million	8.7257%
9. In re Raytheon Co. Sec. Litig., No. 99-12142 (PBS) (D. Mass. Dec. 6, 2004)	$460 million	9%
10. In re Waste Management Inc. Sec. Litig., No. H-99-2183 (S.D. Tex. 2003) ("Waste Management II")	$457 million	7.9%
11. In re Qwest Communications Int'l, Ins. Sec. Litig., No. 01-CV-01451-REB-CBS (D. Colo. Sept. 28, 2006)	$400 million	15%
12. In re Rite Aid Corp. Sec. Litig., 146 F. Supp. 2d 706 and 269 F. Supp. 2d 603 (E.D. Pa. 2001 and 2003)	$319 million	25%
13. In re Oxford Health Plans, Inc. Sec. Litig., MDL 1222, 2003 U.S. Dist. LEXIS 26795 (S.D.N.Y. June 12, 2003)	$300 million	28%
14. In re Daimler Chrysler A.G. Sec. Litig., No. 00-00993 (D. Del. 2004)	$300 million	22.5%
15. In re Cendant Corp. PRIDES Litig., 243 F.3d 722 (3d Cir. 2001)	$298 million	7.8%
16. In re 3Com Corp. Sec. Litig., No. C-97-21083 (N.D. Cal. Mar. 9, 2001)	$259 million	18%
17. In re Am. Continental/Lincoln Savings, MDL No. 834 (D. Ariz. July 24, 1990)	$250 million	25.6%
18. In re Global Crossing Sec. and ERISA Litig., 225 F.R.D. 436 (S.D.N.Y. 2004) (partial settlement)	$245 million	18-19%
19. Waste Management Inc. Sec. Litig., No. 97C7709 (N.D. Ill. Oct. 18, 1999)	$220 million	20%
20. In re Home-Stake Prod. Co. Sec. Litig., MDL No. 153 (N.D. Okla. Jan. 2, 1990)	$185 million	30%
21. In re Dollar General Corp. Sec. Litig., Civ. No. 3:01-0388 (M.D. Tenn. May 24, 2002)	$162 million	20.9%
22. In re Microstrategy Inc. Sec. Litig., 172 F. Supp. 2d 778 (E.D. Va. 2001)	$153.5 million	18%
23. In re Charter Communications, Inc. Sec. Litig., MDL No. 1506, Case No. 4-02-Civ.-1186 (E.D. Mo. 2005)	$146 million	20%
24. Informix Corp. Sec. Litig., No. C-97-1289-CRB (N.D. Cal. Nov. 2, 1999)	$132 million	30%

25. Kurzweil v. Philip Morris Cos., Inc., Nos. 94 Civ. 2373 (MBM), 94 Civ. 2546 (BMB), 1999 WL 1076105 (S.D.N.Y. Nov. 30, 1999)	$123 million	30%
26. In re Conseco, Inc. Sec. Litig., IP 00-585-c-4/5 (S.D. Ind. Aug. 7, 2002)	$120 million	15%
27. In re Deutsche Telekom AG Sec. Litig., No. 00-CV-9475 (NRB) (S.D.N.Y. 2005)	$120 million	28%
28. In re Ikon Office Solutions, Inc. Sec. Litig., 194 F.R.D. 166 (E.D. Pa. 2000)	$111 million	30%
29. In re Sunbeam Sec. Litig., 176 F. Supp. 2d 1323 (S.D. Fla. 2001)	$110 million	25%
30. In re Prudential Sec. Inc. Ltd. P'ships Litig., 912 F. Supp. 97 (S.D.N.Y. 1996)	$110 million	27%
31. In re DPL Inc. Sec. Litig., 307 F. Supp. 2d 947 (S.D. Ohio 2004)	$110 million	20%
32. In re Prison Realty Sec. Litig., No. 3:99-0458, 2001 U.S. Dist. LEXIS 21942 (M.D. Tenn. Feb. 9, 2001)	$104 million	30%
33. In re AT&T Corp. Sec. Litig., 455 F.3d 160 (3d Cir. 2006)	$100 million	21.25%

23. Some obvious generalizations leap out from the foregoing table. Fee award percentages do decline significantly in cases exceeding (or even approaching) $1 billion, and fee awards are likely to be in the single digit range. Below the $1 billion level, many courts continue to award fees in the 20% to 25% range even when the recovery equals or exceeds several hundred million dollars, but others award single digit fees. Because there have been only a handful of cases exceeding $1 billion, however, generalizations are riskier about such cases, and a more fact-intensive analysis of these cases appears necessary (and will follow shortly).

24. Securities class actions do not stand alone. Antitrust class actions are in many respects highly similar to securities class actions in that they are complex cases alleging economic fraud that are litigated by a highly professional national bar. The

following appear to be the dozen largest recoveries in federal antitrust class actions—a group that I consider to be the closest peer group to securities class actions:

Table 3: Largest Antitrust Class Action Recoveries[1]

Case	Recovery	Year	Attorney's Fee Award (includes expenses in some cases)
1. In re Visa Check/MasterMoney Antitrust Litig.	$3.05 billion	2004	6.5%
2. NASDAQ Market-Makers	$1.027 billion	1998	14%
3. Exxon Mobil Corp. v. Allapattah Services	$1.075 billion	2006	31 1/3%
4. Brand Name Prescription Drug	$696 million	2000	25.4%
5. In re Corrugated Container	$550 million	1983	8.0%
6. In re Vitamins Antitrust Litig.	$365 million	2001	33.7%
7. In re Buspirone Patent	$220 million	2003	33.3%
8. In re Lease Oil	$190 million	1999	35.1%
9. In re Plywood Antitrust Litig.	$171.4 million	1983	14.9%
10. Petroleum Products Litig.	$140 million	1994	21%
11. In re Sumitomo Copper Litigation	$132 million	2000	28.3%
12. In re Infant Formula Antitrust Litig.	$125.7 million	1993	26.3%
13. In re Methionine Antitrust Litig.	$107 million	2002	23.3%

Again, there appears some decline in the percentage awarded when the recovery exceeds $1 billion (but not always), and at least as many of the few fee awards in this area have been above the agreement negotiated in this case as have been below it.

[1] Most, but not all this data, comes from Logan, Moshman & Moore, Jr., "Attorney Fee Awards in Common Fund Class Actions," 24 Class Action Reports 169 (March - April 2003).

25. Finally, a well-known study by Logan, Moshman and Moore provides overall data on fee awards in all class actions and suggests that there has been some increase in the average percentage awarded in class action fees.[2] In 1990, in their original study that covered 404 cases, across all varieties of class actions, they found that the average percentage awarded was 14.8%. In 2003, in their new revised study, they find the average percentage awarded to be 18.4%. Because their new study of 1,120 cases includes the 404 cases in the earlier study, the more recent average has to be well above 18.4% (and probably close to 22%) to bring the blended average to 18.4%. In short, the overall trend appeared to be up, and older cases may not be representative in that light.

C. Adding Success to the Equation

26. The foregoing comparisons involve a large data base but still omit any analysis of the two most critical factors in an optimal fee award determination: (1) How successful were plaintiffs' counsel when measured against the best possible outcome?, and (2) How high a level of risk did they face? As discussed below, the Enron settlement appears even more impressive once these factors are added to the equation. Initially, this section will consider the factor of relative success.

27. The most objective measure of relative success is the percentage of the maximum possible damages that were obtained in the settlement. "Maximum possible damages" is an elusive concept, to be sure, but one way to get a reasonably objective approximation of this factor is to compare the actual settlement to the issuer's decline in market capitalization when the fraud was revealed. Necessarily such a comparison

[2] See Logan, Moshman & Moore, Jr., *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Actions Reports 167 (March - April, 2003).

involves some use of estimates, but set forth below is a table that makes this comparison for some of the best known and largest securities class actions:

Table 4

COMPARATIVE SETTLEMENT RECOVERIES/FEE AWARDS

Case	Market Cap Loss	Dollar Recovery	% of Market Cap Loss Recovered	Fee As % of Recovery
Enron	$87 billion	$7.2 billion	8.3%	9.52%
WorldCom	$210 billion	$6.1 billion	2.9%	5.5%
AOL Time Warner	$270 billion	$2.5 billion	0.9%	6%
Nortel I	$138 billion	$1.074 billion	0.8%	8%
Royal Ahold	$29 billion	$1.1 billion	3.7%	12%
McKesson HBOC	$15 billion	$1.032 billion	6.7%	7.8%
Lucent	$233 billion	$630 million	0.3%	17%
Bank of America	$12 billion	$490 million	4.0%	18%
Dynegy	$13 billion	$474 million	3.6%	8.725%
Raytheon	$17 billion	$460 million	2.6%	9%
Waste Management	$27 billion	$457 million	1.7%	8%
Adelphia	$28 billion	$455 million	1.6%	21.4%
Global Crossing	$68 billion	$444 million ($320 million for the securities case)	0.7%	17.7%
NASDAQ (Antitrust)	? (probably in the trillions)	$1 billion	N/A	14%

28. Based on the above data, some contrasts leap out. In WorldCom, the case most often compared to Enron, class counsel recovered only 2.9% of the decline in market capitalization for a recovery of $6.133 billion. Not only did Lead Counsel here recover an additional $1.1 billion (for a $7.23 billion recovery), but in percentage terms it recovered 2.86 times what the WorldCom action recovered (i.e., 8.3% versus 2.9%). Of