Legal Opinion Letter

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JUDGE OFFERS FRANK ASSESSMENT OF LAWYER-DRIVEN SECURITIES SUITS

by
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One of the key reforms that Congress sought when it enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA") was to ensure that aggrieved investors, not their counsel, controlled the direction of federal securities litigation. *See* H.R. Conf. Rep. No. 104-369, at 32 (1995) ("Conf. Rep."). Prior to the passage of the PSLRA, critics complained that federal securities litigation was overwhelmingly lawyer-driven, that plaintiffs' counsel often held a significantly greater financial stake in the litigation than their clients, and that plaintiffs' counsel made decisions based on their own financial interest rather than those of their purported clients. *See* S. Rep. No. 104-98, at 6–7 (1995). Some critics went so far as to contend that "lead plaintiffs" played virtually no role in "leading" federal securities actions and that powerful plaintiffs' securities bar law firms ran these cases as if they had no clients. As William Lerach, an influential plaintiffs' attorney, infamously joked, "I have the greatest practice in the world because I have no clients. I bring the case. I hire the plaintiff. I do not have some client telling me what to do. I decide what to do." 141 Cong. Rec. 192, S 17933, at S 17956-57 (1995).

When it enacted the PSLRA, Congress attempted to return control of securities litigation to the plaintiffs – rather than their lawyers – by adopting a series of procedural and substantive safeguards that were built into the process of selecting lead plaintiff and lead counsel. One of the most important reforms was the presumption that plaintiffs with the most significant holdings and largest purported losses, which Congress believed would routinely be large, sophisticated institutional investors and pension funds, should be appointed lead plaintiff. Congress reasoned that sophisticated institutional plaintiffs would better protect the interests of the aggrieved investor class. *See* Conf. Rep., at 32.

The results of this legislation, however, have been mixed as courts have adjudicated lead plaintiff and lead counsel disputes in hundreds of federal securities actions since the enactment of the PSLRA. In *In re Molson Coors Brewing Co. Sec. Litig.*, Civ. No. 05-294-KAJ, 2005 WL 3271488 (D. Del. Dec. 2, 2005), Judge Kent A. Jordan of the United States District Court for the District of Delaware offered an unusually frank and blunt view of the continuing problem of lawyer-driven federal securities litigation. In *Molson Coors*, plaintiffs filed a federal securities class action asserting violations of Section 10(b), 14(a) and 20(a) of the Securities Exchange Act of 1934 relating to the February 9, 2005 merger of Molson, Inc. and Adolph Coors Company to create Molson Coors Brewing Company. *Id*. at *1. At issue in this decision were the competing motions of two pension funds to be appointed lead plaintiff and to have their respective law firms appointed lead counsel. *Id*. at *2. The competing pension funds were represented by two of the titans of the

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plaintiffs' securities bar: Milberg Weiss Bershad & Schulman LLP and Lerach Coughlin Stoia Geller Rudman & Robbins LLP. *Id.*

In the Memorandum Order, Judge Jordan pulled no punches when he described the motion for appointment of lead plaintiff and lead counsel as "time to decide which of the plaintiffs' law firms will *win the money race*." *Id.* (emphasis added). In the footnote that immediately followed this provocative statement, Judge Jordan plainly expressed his view that the so-called reform of lawyer-driven litigation has not materialized in practice:

> I mean simply to be honest about what is at stake. It is the *lead counsel* who stands to gain, *not the lead plaintiff*, as both the tone of the arguments and the logic of the incentives suggest here. The 'pick me' urgency seems far more likely to come from the lawyers than the parties because, in the real world, people are not so eager to undertake work that someone else will do for them. . . . The incentives giving rise to the classic 'free rider' phenomenon, i.e., the inclination of people to take advantage of a benefit without bearing a commensurate portion of the associated burden, do not evaporate simply because securities are involved. They get *overridden because securities lawyers are involved*, lawyers who are vying for the chance to take the laboring oar in litigation and *the monetary rewards that go with it.*

Id. at *2 n.4 (emphasis added). Judge Jordan candidly explained that plaintiffs' law firms – not the plaintiffs – are still controlling the actions and are still the parties with the economic incentive to bring these actions, direct them, and reap a substantial percentage of the rewards.

Judge Jordan disdainfully further characterized the hundreds of pages of documents submitted by plaintiffs' counsel with respect to the motions for appointment of lead plaintiff and lead counsel, not as a well-reasoned debate over important legal issues, but rather that "this exercise is simply a business investment for the lawyers. They invest their time and consume judicial resources in the hope of scoring a significant financial return." *Id.* Although he attempted to remain neutral and did not identify any particular plaintiff law firm for perceived abuses, Judge Jordan's antipathy towards these practices and his sorrow that important public policy goals have not been achieved are evident. He concluded that:

> [The plaintiffs' law firms' practice] is perfectly rational from an economic perspective, but, from a public policy perspective, one might question whether the right incentives are yet in place. It is for others to determine the degree to which the Congressional goal of making class action securities cases more client-driven and less lawyer-driven had been realized. . . . At this stage of the case, however, *it appears that the lawyers are still very much in the driver's seat*.

Id. (citations omitted) (emphasis added).

Judge Jordan's brutally honest assessment of motions for lead plaintiff and lead counsel as "time to decide which of the plaintiffs' law firm wins the money race" may raise some legislative eyebrows when Congress next seeks to enact laws relating to perceived abuses in federal securities litigation. The poignant prose and frank critique that follows in footnote 4 of this Order is reminiscent of another famous footnote 4: *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). Although the future of legislative and judicial reform of perceived abuses in federal securities litigation is murky, footnote 4 of *Molson Coors* may serve as a beacon for those who would like to re-address and correct the lawyer-driven nature of federal securities litigation.

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