# Federal Class Action Filings Summary (Dollars in Billions)

<table>
<thead>
<tr>
<th></th>
<th>Average</th>
<th>Annual (1997–2017)</th>
<th>2017</th>
<th>2018</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Maximum</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Class Action Filings</td>
<td>203</td>
<td>412</td>
<td>412</td>
<td>403</td>
</tr>
<tr>
<td>Core Filings</td>
<td>182</td>
<td>242</td>
<td>214</td>
<td>221</td>
</tr>
<tr>
<td>Disclosure Dollar Loss (DDL)</td>
<td>$120</td>
<td>$240</td>
<td>$131</td>
<td>$330</td>
</tr>
<tr>
<td>Maximum Dollar Loss (MDL)</td>
<td>$602</td>
<td>$2,046</td>
<td>$521</td>
<td>$1,311</td>
</tr>
</tbody>
</table>

*Securities Class Action Filings—2018 Year in Review, Figure 1. © 2019 Cornerstone Research. All rights reserved.*
Note: There were two cases in 2011 that were both an M&A filing and a Chinese reverse merger filing. These filings were classified as M&A filings in order to avoid double counting.

Securities Class Action Filings—2018 Year in Review, Figure 4. © 2019 Cornerstone Research. All rights reserved.
Note:
1. See Appendix 1 for the average and median values of DDL.
2. Figures may not sum due to rounding.

Securities Class Action Filings—2018 Year in Review, Figure 6. © 2019 Cornerstone Research. All rights reserved.
Median Disclosure Dollar Loss
2004–2018

Note: For more information, see Appendix 1.
Securities Class Action Filings—2018 Year in Review, Figure 8. © 2019 Cornerstone Research. All rights reserved.
Allegations Box Score—Core Filings

<table>
<thead>
<tr>
<th>Allegations in Core Filings²</th>
<th>Percentage of Filings¹</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2014</td>
</tr>
<tr>
<td>Rule 10b-5 Claims</td>
<td>93%</td>
</tr>
<tr>
<td>Section 11 Claims</td>
<td>15%</td>
</tr>
<tr>
<td>Section 12(2) Claims</td>
<td>7%</td>
</tr>
<tr>
<td>Misrepresentations in Financial Documents</td>
<td>95%</td>
</tr>
<tr>
<td>False Forward-Looking Statements</td>
<td>51%</td>
</tr>
<tr>
<td>Trading by Company Insiders</td>
<td>16%</td>
</tr>
<tr>
<td>GAAP Violations³</td>
<td>39%</td>
</tr>
<tr>
<td>Announced Restatement⁴</td>
<td>19%</td>
</tr>
<tr>
<td>Internal Control Weaknesses⁵</td>
<td>26%</td>
</tr>
<tr>
<td>Announced Internal Control Weaknesses⁶</td>
<td>11%</td>
</tr>
<tr>
<td>Underwriter Defendant</td>
<td>12%</td>
</tr>
<tr>
<td>Auditor Defendant</td>
<td>1%</td>
</tr>
</tbody>
</table>

Note:
1. The percentages do not add to 100 percent because complaints may include multiple allegations.
2. Core filings are all federal securities class actions excluding those defined as M&A filings.
3. First identified complaint (FIC) includes allegations of GAAP violations. In some cases, plaintiff(s) may not have expressly referenced GAAP; however, the allegations, if true, would represent GAAP violations.
4. FIC includes allegations of GAAP violations and refers to an announcement during or subsequent to the class period that the company will restate, may restate, or has unreliable financial statements.
5. FIC includes allegations of internal control weaknesses over financial reporting.
6. FIC includes allegations of internal control weaknesses and refers to an announcement during or subsequent to the class period that the company has internal control weaknesses over financial reporting.

Securities Class Action Filings—2018 Year in Review, Figure 9. © 2019 Cornerstone Research. All rights reserved.
Percentage of U.S. Exchange-Listed Companies Subject to Filings 2004–2018

Number of Firms | 5,643 | 5,593 | 5,525 | 5,467 | 5,339 | 5,042 | 4,764 | 4,660 | 4,529 | 4,411 | 4,416 | 4,578 | 4,593 | 4,411 | 4,406
--- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | ---
Percent Change | (5.9%) | (0.9%) | (1.2%) | (1.0%) | (2.3%) | (5.6%) | (5.5%) | (2.2%) | (2.8%) | (2.6%) | 0.1% | 3.7% | 0.3% | (4.0%) | (0.1%)

Source: Securities Class Action Clearinghouse; Center for Research in Security Prices (CRSP)

Note:
1. Percentages are calculated by dividing the count of issuers listed on the NYSE or Nasdaq subject to filings by the number of companies listed on the NYSE or Nasdaq as of the beginning year.
2. Listed companies were identified by taking the count of listed securities at the beginning of each year and accounting for cross-listed companies or companies with more than one security traded on a given exchange. Securities were counted if they were classified as common stock or American Depositary Receipts (ADRs) and listed on the NYSE or Nasdaq.
3. Percentages may not sum due to rounding.

Securities Class Action Filings—2018 Year in Review, Figure 10. © 2019 Cornerstone Research. All rights reserved.
Heat Maps of S&P 500 Securities Litigation™ Percentage of Companies Subject to Core Filings

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Consumer Discretionary</td>
<td>5.0%</td>
<td>3.8%</td>
<td>5.1%</td>
<td>3.8%</td>
<td>4.9%</td>
<td>8.4%</td>
<td>1.2%</td>
<td>0.0%</td>
<td>3.6%</td>
<td>8.5%</td>
<td>10.0%</td>
</tr>
<tr>
<td>Consumer Staples</td>
<td>2.9%</td>
<td>4.9%</td>
<td>0.0%</td>
<td>2.4%</td>
<td>2.4%</td>
<td>0.0%</td>
<td>0.0%</td>
<td>5.0%</td>
<td>2.6%</td>
<td>2.7%</td>
<td>11.8%</td>
</tr>
<tr>
<td>Energy/Materials</td>
<td>1.5%</td>
<td>1.5%</td>
<td>4.3%</td>
<td>0.0%</td>
<td>2.7%</td>
<td>0.0%</td>
<td>1.3%</td>
<td>0.0%</td>
<td>4.5%</td>
<td>3.3%</td>
<td>1.8%</td>
</tr>
<tr>
<td>Financials/Real Estate</td>
<td>8.1%</td>
<td>10.7%</td>
<td>10.3%</td>
<td>1.2%</td>
<td>3.7%</td>
<td>0.0%</td>
<td>1.2%</td>
<td>1.2%</td>
<td>6.9%</td>
<td>3.3%</td>
<td>7.0%</td>
</tr>
<tr>
<td>Health Care</td>
<td>8.3%</td>
<td>3.7%</td>
<td>13.5%</td>
<td>2.0%</td>
<td>1.9%</td>
<td>5.7%</td>
<td>0.0%</td>
<td>1.9%</td>
<td>17.9%</td>
<td>8.3%</td>
<td>16.1%</td>
</tr>
<tr>
<td>Industrials</td>
<td>3.5%</td>
<td>6.9%</td>
<td>0.0%</td>
<td>1.7%</td>
<td>1.6%</td>
<td>0.0%</td>
<td>4.7%</td>
<td>0.0%</td>
<td>6.1%</td>
<td>8.7%</td>
<td>8.8%</td>
</tr>
<tr>
<td>Telecommunications/</td>
<td>6.0%</td>
<td>1.2%</td>
<td>2.4%</td>
<td>7.1%</td>
<td>3.8%</td>
<td>9.1%</td>
<td>0.0%</td>
<td>4.2%</td>
<td>6.8%</td>
<td>8.5%</td>
<td>12.7%</td>
</tr>
<tr>
<td>Information Tech</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Utilities</td>
<td>5.2%</td>
<td>0.0%</td>
<td>0.0%</td>
<td>2.9%</td>
<td>0.0%</td>
<td>0.0%</td>
<td>0.0%</td>
<td>3.4%</td>
<td>3.4%</td>
<td>7.1%</td>
<td>7.1%</td>
</tr>
<tr>
<td>All S&amp;P 500 Companies</td>
<td>5.2%</td>
<td>4.4%</td>
<td>4.8%</td>
<td>2.8%</td>
<td>3.0%</td>
<td>3.4%</td>
<td>1.2%</td>
<td>1.6%</td>
<td>6.6%</td>
<td>6.4%</td>
<td>9.4%</td>
</tr>
</tbody>
</table>

Note:

1. The chart is based on the composition of the S&P 500 as of the last trading day of the previous year.
2. Sectors are based on the Global Industry Classification Standard (GICS).
3. Percentage of Companies Subject to New Filings equals the number of companies subject to new securities class action filings in federal courts in each sector divided by the total number of companies in that sector. See Appendix 2A for additional detail.
4. In August 2016, GICS added a new industry sector, Real Estate. This analysis begins using the Real Estate industry sector in 2017.

Securities Class Action Filings—2018 Year in Review, Figure 11. © 2019 Cornerstone Research. All rights reserved.
Annual M&A Filings by Circuit
2009–2018

Note:

Securities Class Action Filings—2018 Year in Review, Figure 13. © 2019 Cornerstone Research. All rights reserved.
Note: Percentages may not sum to 100 percent due to rounding.
Note:

1. Percentage of cases in each category is calculated as the number of cases that were dismissed within one, two, or three years of the filing date divided by the total number of cases filed each year.

2. The outlined portions of the stacked bars for years 2016 through 2018 indicate the percentage of cases dismissed through the end of 2018. The outlined portions of these stacked bars therefore present only partial-year observed resolution activity, whereas their counterparts in earlier years show an entire year.

3. For more information, see Appendix 4.

Securities Class Action Filings—2018 Year in Review, Figure 16. © 2019 Cornerstone Research. All rights reserved.
Federal Section 11 and State 1933 Act
Class Action Filings by Venue
2010–2018

Source: Stanford Law School and Securities Class Action Clearinghouse; Bloomberg Law; ISS’ SCAS

Note:
1. The federal Section 11 data displayed may contain Rule 10b-5 claims, but state Section 11 data do not.
2. Section 11 filings in federal courts may include parallel (or related) cases filed in state courts. When these cases are filed in different years, the earliest filing is counted. If filings against the same company are brought in different states in addition to a filing brought in federal court, the parallel filing is counted as a unique case and the state-only filing is treated as a unique case. Filings against the same company brought in different states without a parallel filing brought in federal court are counted as unique state filings.
3. California state filings in 2018 may contain either Section 11 or Section 12 claims. Of the 16 filings in California in 2018, six filings contained Section 12 claims without also containing Section 11 claims.

Securities Class Action Filings—2018 Year in Review, Figure 21. © 2019 Cornerstone Research. All rights reserved.
Annual Median Lag between Class Period End Date and Filing Date—Core Filings 2009–2018

Note: This analysis also excludes filings with only Section 11 claims and ICO- or cryptocurrency-related filings because there is often no specified end of the class period.

Securities Class Action Filings—2018 Year in Review, Figure 25. © 2019 Cornerstone Research. All rights reserved.
# Mega Filings
(Dollars in Billions)

<table>
<thead>
<tr>
<th></th>
<th>Average 1997–2017</th>
<th>2016</th>
<th>2017</th>
<th>2018</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Mega Disclosure Dollar Loss (DDL) Filings</strong>¹</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mega DDL Filings</td>
<td>5</td>
<td>5</td>
<td>7</td>
<td>17</td>
</tr>
<tr>
<td>DDL</td>
<td>$63</td>
<td>$33</td>
<td>$47</td>
<td>$212</td>
</tr>
<tr>
<td>Percentage of Total DDL</td>
<td>52%</td>
<td>31%</td>
<td>36%</td>
<td>64%</td>
</tr>
<tr>
<td><strong>Mega Maximum Dollar Loss (MDL) Filings</strong>²</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mega MDL Filings</td>
<td>13</td>
<td>21</td>
<td>14</td>
<td>27</td>
</tr>
<tr>
<td>MDL</td>
<td>$421</td>
<td>$533</td>
<td>$253</td>
<td>$963</td>
</tr>
<tr>
<td>Percentage of Total MDL</td>
<td>70%</td>
<td>66%</td>
<td>49%</td>
<td>73%</td>
</tr>
</tbody>
</table>

Note:
1. Mega DDL filings have a disclosure dollar loss of at least $5 billion.
2. Mega MDL filings have a maximum dollar loss of at least $10 billion.
3. See Appendix 1 for total DDL values.

Securities Class Action Filings—2018 Year in Review, Figure 29. © 2019 Cornerstone Research. All rights reserved.
Filings by Industry—Core Filings

Note:
1. Filings with missing sector information or infrequently used sectors may be excluded. For more information, see Appendix 7.
2. Sectors are based on the Bloomberg Industry Classification System.

Securities Class Action Filings—2018 Year in Review, Figure 32. © 2019 Cornerstone Research. All rights reserved.
Filings by Circuit—Core Filings

Note: For more information, see Appendix 8.

Securities Class Action Filings—2018 Year in Review, Figure 34. © 2019 Cornerstone Research. All rights reserved.
Settlements
Total Settlement Dollars
2009–2018
Dollars in Billions

<table>
<thead>
<tr>
<th>Year</th>
<th>Dollars in Billions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>$4.3</td>
</tr>
<tr>
<td>2010</td>
<td>$3.5</td>
</tr>
<tr>
<td>2011</td>
<td>$1.5</td>
</tr>
<tr>
<td>2012</td>
<td>$3.8</td>
</tr>
<tr>
<td>2013</td>
<td>$5.1</td>
</tr>
<tr>
<td>2014</td>
<td>$1.2</td>
</tr>
<tr>
<td>2015</td>
<td>$3.2</td>
</tr>
<tr>
<td>2016</td>
<td>$6.3</td>
</tr>
<tr>
<td>2017</td>
<td>$1.5</td>
</tr>
<tr>
<td>2018</td>
<td>$5.1</td>
</tr>
</tbody>
</table>

Note: Settlement dollars adjusted for inflation; 2018 dollar equivalent figures used. 2018 results are preliminary and subject to revision.

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Note:
Mega-Settlements defined as total settlement funds equal to or greater than $100 million.
Settlement dollars adjusted for inflation; 2018 dollar equivalent figures used. 2018 results are preliminary and subject to revision.

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## Industry Sectors

2014–2018

Dollars in Millions

<table>
<thead>
<tr>
<th>Industry</th>
<th>Number of Settlements</th>
<th>Median Settlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Technology</td>
<td>61</td>
<td>$5.2</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>49</td>
<td>$6.9</td>
</tr>
<tr>
<td>Financial</td>
<td>44</td>
<td>$18.9</td>
</tr>
<tr>
<td>Retail</td>
<td>23</td>
<td>$9.5</td>
</tr>
<tr>
<td>Telecommunications</td>
<td>14</td>
<td>$9.0</td>
</tr>
<tr>
<td>Healthcare</td>
<td>9</td>
<td>$8.3</td>
</tr>
</tbody>
</table>

Note: Settlement dollars adjusted for inflation; 2018 dollar equivalent figures used. 2018 results are preliminary and subject to revision.

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## Settlements by Court Circuit
### 2014–2018
#### Dollars In Millions

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Number of Settlements</th>
<th>Median Settlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>First</td>
<td>15</td>
<td>$7.3</td>
</tr>
<tr>
<td>Second</td>
<td>97</td>
<td>$7.0</td>
</tr>
<tr>
<td>Third</td>
<td>33</td>
<td>$4.4</td>
</tr>
<tr>
<td>Fourth</td>
<td>13</td>
<td>$16.4</td>
</tr>
<tr>
<td>Fifth</td>
<td>18</td>
<td>$8.9</td>
</tr>
<tr>
<td>Sixth</td>
<td>17</td>
<td>$7.4</td>
</tr>
<tr>
<td>Seventh</td>
<td>16</td>
<td>$11.7</td>
</tr>
<tr>
<td>Eighth</td>
<td>6</td>
<td>$27.3</td>
</tr>
<tr>
<td>Ninth</td>
<td>98</td>
<td>$6.4</td>
</tr>
<tr>
<td>Tenth</td>
<td>10</td>
<td>$8.4</td>
</tr>
<tr>
<td>Eleventh</td>
<td>20</td>
<td>$9.7</td>
</tr>
<tr>
<td>DC</td>
<td>2</td>
<td>$23.0</td>
</tr>
</tbody>
</table>

Note: Settlement dollars adjusted for inflation; 2018 dollar equivalent figures used. 2018 results are preliminary and subject to revision.

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Securities Litigation and the #MeToo Movement
Generally allege that the company failed to disclose sexual harassment and as a result, when the media outlets exposed the story, the stock price fell and harmed investors.
Generally allege that the D&Os breached their fiduciary duties or wasted corporate assets when ignoring the hostile work environment caused by sexual harassment by executives, failing to remedy the problem, and then paying for subsequent severance payments, litigation costs, and other related costs.
# Status of #MeToo Cases

<table>
<thead>
<tr>
<th>Company</th>
<th>Case Type</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fox</td>
<td>Derivative</td>
<td>Settled for $90M</td>
</tr>
<tr>
<td>Liberty Tax</td>
<td>Derivative</td>
<td>Discovery</td>
</tr>
<tr>
<td>Liberty Tax</td>
<td>Securities</td>
<td>MTD pending</td>
</tr>
<tr>
<td>Wynn</td>
<td>Securities</td>
<td>MTD Due 4/15/19</td>
</tr>
<tr>
<td>Wynn</td>
<td>Derivative</td>
<td>MTD pending</td>
</tr>
<tr>
<td>Signet Jewelers</td>
<td>Securities</td>
<td>MTD denied</td>
</tr>
<tr>
<td>LaCroix</td>
<td>Securities</td>
<td>MTD pending</td>
</tr>
<tr>
<td>CBS</td>
<td>Securities</td>
<td>Pleadings</td>
</tr>
<tr>
<td>Papa John’s</td>
<td>Securities</td>
<td>Pleadings</td>
</tr>
<tr>
<td>Nike</td>
<td>Derivative</td>
<td>MTD pending</td>
</tr>
<tr>
<td>Lululemon</td>
<td>Derivative</td>
<td>MTD pending</td>
</tr>
<tr>
<td>Alphabet/Google</td>
<td>Derivative</td>
<td>Pleadings</td>
</tr>
</tbody>
</table>
• *Panic I*, 793 A.2d 356, 359 (Del. Ch. 2000): MTD granted because demand was not futile.

• *In re Am. Apparel S’holder Derivative Litig.*, No. CV 10-06576 MMM (RCx), 2012 WL 9506072, at *1, *25 (C.D. Cal. July 31, 2012): MTD granted because the plaintiffs had not pled particularized facts indicating that the board failed to act despite actual or constructive knowledge.

• *Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-Packard Co. (H-P II ),* 845 F.3d 1268 (9th Cir. 2017): Dismissal affirmed because the investors failed to plead any material misrepresentations.

• *Lopez v. CTPartners Exec. Search Inc.*, 173 F. Supp. 3d 12 (S.D.N.Y. 2016): MTD granted because the Company’s statements regarding its corporate culture amounted to “immaterial puffery” and company had no affirmative duty to disclose sexual harassment.
• Securities class action alleged Signet concealed a class action by female employees alleging gender discrimination and concealed sexual harassment by senior executives.

• Alleged misstatements:
  
  ▪ *Jock* litigation limited to gender discrimination claims concerning “store-level employment practices” that were investigated and unsubstantiated.
  
  ▪ Signet “committed to a workplace that is free from sexual, racial, or other unlawful harassment.”
  
  ▪ Importance of “trust” to its business.
Motion to dismiss denied.

Signet misleadingly described the *Jock* litigation in its public filings.

Signet’s code of conduct and statement that it was committed to a harassment-free workplace can form the basis of a securities fraud claim where the representations are directly at odds with the conduct alleged in the complaint.

Generalized statements touting the importance of Signet’s relationship with its employees and customer trust in the Signet brand were puffery.
Emulex Corp. v. Varjabedian: Supreme Court to Address Standards under Section 14(e)
“It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.” 15 U.S.C. § 78n(e).

• Disjunctive clauses connected by “or.”
• Only the second clause contains language traditionally associated with scienter (“fraudulent, deceptive, or manipulative”).
“Whether the Ninth Circuit correctly held, in express disagreement with five other courts of appeals, that Section 14(e) of the Securities Exchange Act of 1934 supports an inferred private right of action based on a negligent misstatement or omission made in connection with a tender offer.”

- Does Section 14(e) create a private right of action?
- Assuming that it does, must a Section 14(e) plaintiff plead that the defendant acted with scienter or merely negligence?
Background
Starting in 2009 and 2010, almost every sizeable merger began to draw challenges under state law.

Delaware tried to curb state law claims in cases like *In re Trulia*, 129 A.3d 884 (Del. Ch. 2016).

Plaintiffs responded to *Trulia* by bringing claims in federal court, under federal law, instead.

At the same time, more acquisitions structured as tender offers because of enactment of Section 251(h) of DGCL.
Spike in federal merger challenges

Spike in number of tender offers

Section 14(e) has been getting more of a workout, leading to new questions about the proper interpretation of the statute.
GIBSON DUNN

Decisions Below
• **February 2015:** Emulex Corporation and Avago Technologies Wireless Manufacturing Inc. announced that they had entered into a merger agreement.

• Avago offered to pay $8.00 per share for outstanding Emulex stock.
• Emulex filed a recommendation statement with the SEC in support of the tender offer.
  - Emulex elected not to include a summary of a one-page Premium Analysis that had been performed by Goldman Sachs.
  - The Premium Analysis showed that the transaction premium fell within the normal range, but was below average.

• Enough Emulex shareholders accepted the tender offer to consummate the merger.
The Facts

• **April 2015**: Plaintiffs brought a securities class action against Emulex, alleging that the $8.00-per-share price offered by Avago was inadequate.

• As relevant here, plaintiffs argued that Emulex violated Section 14(e) of the Exchange Act by omitting the Premium Analysis from its recommendation statement.
The Central District of California dismissed the Section 14(e) claim, holding that Section 14(e) requires a showing of **scienter** and that plaintiffs failed to plead that Emulex acted with scienter in omitting the Premium Analysis.

In the absence of binding CA9 precedent, the court looked to out-of-circuit precedent.

- “[S]o far as the Court can determine, no federal court has held that § 14(e) requires only a showing of negligence. Considering the wealth of persuasive case law to the contrary, the Court concludes that the better view is that the similarities between Rule 10b–5 and § 14(e) require a plaintiff bringing a cause of action under § 14(e) to allege scienter.”
• *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973).

• *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579 (5th Cir. 1974) ("[S]ome culpability, beyond mere negligence, is required [to state a claim for damages under Section 14(e)].").

• *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 431 (6th Cir. 1980) ("The language of the Williams Act clearly demonstrates that Congress envisioned scienter to be an element of 14(e).").

• *In re Digital Island Securities Litigation*, 357 F.3d 322 (3d Cir. 2004) (joining "those circuits that hold that scienter is an element of a Section 14(e) claim").

• *SEC v. Ginsburg*, 362 F.3d 1292 (11th Cir. 2004) ("[T]o establish liability under [Section 14(e)], the SEC must prove that [the defendant] acted with scienter . . . .").
Varjabedian v. Emulex Corp.,
888 F.3d 399 (9th Cir. 2018)

- Reversed and remanded as to the Section 14(e) claims.
- Held that Section 14(e) requires plaintiffs to prove only that defendants acted negligently, not with scienter, when making alleged misstatements or omissions in tender offer disclosures.
- Emphasized disjunctive construction of the provision.
- Acknowledged break from five other Circuits, but concluded that intervening Supreme Court precedent mandated that result.
  - *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (Section 10(b) and Rule 10b-5 require a showing of scienter)
  - *Aaron v. SEC*, 446 U.S. 680 (1980) (Section 17(a)(2) of the Securities Act does not require a showing of scienter)
Defendants’ Arguments

• Defendants contend that Section 14(e) contains a scienter requirement because:
  ▪ The provision contains words associated with scienter (“fraudulent,” “deceptive,” “manipulative”).
  ▪ Like Section 10(b), which requires scienter, the provision lacks the “procedural restrictions” that Congress has included when it has created a private right of action with a negligence standard.

• Petitioners suggest that Section 14(e) may not contain a private right of action at all:
  ▪ “In any event, there is no basis for inferring any private right of action under Section 14(e) in light of the demands of this Court’s modern test for determining whether implied private rights exist.”
Plaintiffs’ Arguments

• Plaintiffs contend that Section 14(e) has no scienter requirement because:
  - The two clauses in Section 14(e) are independent bans on distinct categories of wrongdoing (otherwise, would have surplusage problem).
  - The Supreme Court in Aaron construed nearly identical language in Section 17(a)(2) as requiring only negligence.
  - The Supreme Court in Ernst adopted a scienter requirement for Rule 10b-5 based not on the text but on policy reasons that are inapplicable here.
  - The general policy of Section 14(e) is to encourage meaningful disclosures and hold corporate actors responsible.
Implications
• A Decision in Plaintiffs’ Favor:
  ▪ Harder for defendants to dismiss Section 14(e) claims at the MTD stage.
  ▪ Will likely increase number of federal lawsuits challenging disclosures made in connection with a tender offer, amplifying post-Trulia trend.
  ▪ Will likely increase prevalence and value of “disclosure settlements.”
  ▪ Might subject financial institutions acting in an advisory role to liability under Section 14(e) (SIFMA Amicus Brief).
  ▪ Might encourage over-disclosure of information to shareholders (SIFMA Amicus Brief).
• **A Decision in Defendants’ Favor:**
  - Section 14(e) claims in federal court will be much less appealing to plaintiffs, as scienter is difficult to plead and prove.
  - May lead plaintiffs to redirect fiduciary duty suits back to state of target’s headquarters or incorporation (if other than DE), or possibly to not bring these suits at all.
  - May lose benefits produced by legitimate shareholder lawsuits.
  - If SCOTUS holds that Section 14(e) provides no private right of action, investors will be left with having to challenge tender offers under either Rule 10b-5 (which requires scienter) or under state law.
  - If SCOTUS reserves decision on whether Section 14(e) creates any private right of action, likely to see numerous test cases in lower courts
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Professional Profiles
Jennifer L. Conn is a litigation partner in the New York office of Gibson, Dunn & Crutcher. She is a member of Gibson Dunn’s General Commercial Litigation, Securities Litigation, Appellate, and Privacy, Cybersecurity and Consumer Protection Practice Groups.

Ms. Conn is a commercial litigator, who has extensive experience in a wide range of complex commercial litigation matters, including those involving securities, financial services, accounting malpractice, antitrust, contracts, insurance and information technology. Prior to joining Gibson Dunn, Ms. Conn was an associate with Cravath, Swaine & Moore in New York. She also was a law clerk for the Honorable Lawrence M. McKenna, United States District Judge for the Southern District of New York.

Ms. Conn received her Juris Doctor from Columbia University School of Law in 1995, where she was a Harlan Fiske Stone Scholar. She graduated, cum laude with distinction in all subjects, from Cornell University, College of Arts and Sciences, in 1992, with a Bachelor of Arts in Government.

Ms. Conn regularly writes and speaks on various subjects, particularly those relating to securities litigation. She is the co-editor and co-author of the Firm’s Practicing Law Institute Treatise, Securities Litigation: A Practitioner’s Guide.

Ms. Conn is admitted to practice in the State of New York, the District of Columbia (inactive status), the United States District Courts for the Southern and Eastern Districts of New York and the Eastern District of Wisconsin, the United States Courts of Appeal for the Second and Eighth Circuits, and the United States Supreme Court.
Marshall R. King is a partner in the New York office of Gibson, Dunn & Crutcher. Mr. King is a member of Gibson Dunn’s Class Actions and Securities Litigation Practice Groups.

Mr. King has extensive experience in commercial and business litigation matters, with particular focus on securities litigation. Mr. King represented Artémis, a French company, in two federal jury trials arising out of the rehabilitation of Executive Life Insurance Company, which resulted in favorable verdicts, and was selected as one of the Daily Journal’s Top Defense Verdicts of 2012. He is currently representing UBS in suits arising out of the Madoff Ponzi scheme, and has represented UBS in several securities litigation class actions. He often represents buyers or sellers in disputes arising out of acquisitions. Mr. King has advised foreign member firms of Deloitte & Touche in a variety of matters and has represented them in litigation in U.S. courts. Mr. King represented Tyco in litigation with bondholders arising out of a spin-off of several Tyco businesses, and has advised companies in other disputes concerning their rights under bond indentures. He has represented financial institutions in litigation arising out of the collapse of Enron, Adelphia and Lehman Brothers. He also has experience in bankruptcy and derivative litigation.

In a national survey of lawyers and clients conducted by Lawdragon.com, Mr. King was voted one of the country’s "500 New Stars" in law. Mr. King received his Juris Doctor cum laude in 1991 from Harvard Law School. He received his Bachelor of Arts degree with high honors in Economics from Princeton University in 1988.

Mr. King is a member of the Bars of New York and New Jersey.
Ms. Levin is a partner in the New York office of Gibson, Dunn & Crutcher. Ms. Levin is a member of Gibson Dunn’s Securities Litigation Practice, Labor and Employment Practice, and Media, Entertainment and Technology Practice Groups. She is a member of the Firm’s Diversity Committee.

Ms. Levin’s practice focuses on representing corporate clients in securities, employment, and general litigation matters. Ms. Levin specializes in securities class actions, shareholder derivative litigation, SOX and Dodd-Frank whistleblower litigation, and employment litigation. She has obtained dismissal at the pleadings stage of securities claims asserted against issuers, individuals, and underwriters. Ms. Levin has also successfully resolved a number of SOX and Dodd-Frank “whistleblower” matters, and obtained one of the first decisions holding that Dodd-Frank whistleblower claims are arbitrable.

Ms. Levin also has significant experience representing media, technology and entertainment companies in a wide array of matters, including government investigations, intellectual property litigation (copyright, trademark, right of publicity, and trade secret), and privacy and defamation cases. She has represented a major digital download service provider in a number of copyright infringement actions relating to music licenses.

Ms. Levin is recognized as a leader in the field of labor and employment. She is named as a “next generation” lawyer by The Legal 500 US 2017, and a 2017 Law360 Rising Star. In 2016, Benchmark Litigation’s recognized her in their “Under 40 Hot List” which honors the achievements of the nation’s most accomplished legal partners of the age of forty or younger.

Ms. Levin graduated from the University of Pennsylvania Law School in 2006, where she was an Editor of the Law Review, and received her Bachelor of Arts in Political Science from the University of Pennsylvania in 2002.

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