

SECURITIES CLASS ACTIONS AND SEC ENFORCEMENT,
AN UPDATE TO PROFESSORS COX AND THOMAS' EMPIRICAL STUDY

For better or worse the class action lawsuit is ingrained in American culture. It gives putative plaintiffs a chance to recover damages for claims that would normally not be worth pursuing. It also results in damage awards that can make headlines and destroy companies.

In 2003 Professors James Cox and Randall Thomas published *SEC Enforcement Heuristics: An Empirical Inquiry*, which studied the relationship between securities class actions and the Security and Exchange Commission's enforcement efforts. They found that for the period from 1997-2002 the SEC was preoccupied with smaller companies, while the plaintiff's bar was predictably more concerned with larger companies.¹ In 2004 they published an update, concluding that the SEC had shifted focus to companies where shareholders have suffered greater provable losses.² A lot has happened since 2004 in the securities world, the suits from the major corporate scandals of 2002 have settled, while stock options backdating litigation took center stage, and the recent turn in the sub-prime mortgage market is starting to build its own wave of class actions. In addition, securities class actions have been changed by the prosecution of the nation's leading plaintiff's law firm and the denial of scheme liability by the Supreme Court. It seems an appropriate time to update Professor Cox and Thomas's study to examine the most recent trends in class actions and SEC enforcement.

The first section of this paper will summarize the methodology and findings of the previous heuristics studies, the second will survey the landscape of changes in the SEC and in securities class actions, and the third part will review the most recent empirical data available, from 2005-2007. Looking at all three shows the interrelated changes in the SEC's enforcement priorities and behavior of investors and defendant companies.

EMPIRICAL ANALYSIS BY PROFESSORS COX AND THOMAS

The heuristics study aimed to explore how important the private securities class action suits are to the enforcement of the securities laws and how well the SEC carries out its mission of protecting investors through enforcement.³ It concluded that there is little overlap between private and SEC suits,⁴ meaning that neither should be exclusively relied on to police the markets. Cox and Thomas initially looked at the period between 1997 and 2002⁵ for information on the SEC and empirical data, but expanded the time period to 1990-2003 in their follow-up study.⁶

Looking at the types of enforcement proceedings the SEC used, they found that the SEC preferred civil injunctions and administrative proceedings, which amounted to substantially all of the enforcement actions the SEC commenced during the period.⁷ The SEC initiated between 475 and 600 enforcement actions in each of those years. These were further broken down by type, and half of all types of actions (about 260 to 300 actions per year) would be of a nature that might allow a parallel securities class action

claim.⁸ Violations of either the securities offering process, the financial statement reporting process, or insider trading regulations could lead to a class action by aggrieved investors.⁹ The authors also observed that the SEC received over 20,000 complaints per year, and almost 20,000 public companies filed quarterly financial reports per year. It is doubtful that the level of compliance is so high that the SEC can only find 600 instances to initiate enforcement actions.¹⁰ Therefore, the SEC must have a policy to prioritize its enforcement efforts.

The SEC laid out their method of prioritizing action in a hearing before the Senate Subcommittee on Oversight of Government Management.¹¹ Most important for the Enforcement Division was the message delivered to the industry and public, then the amount of investor harm done, third the deterrent value of the action, and finally, the SEC's visibility in certain traditional regulation areas.¹² Cox and Thomas point out that because the SEC cannot enforce all of the violations of securities law, the private securities suit serves a very important function in the overall enforcement market.¹³ This point was important because by examining the Government Accounting Office's reports on Commission staff turnover staffing rates, the SEC's ability to effectively carry out its enforcement mandate was questionable. One-third of all enforcement staff left between 1998 and 2000 and average staff tenure decreased to 2.5 years; the Commission was under-staffed at the end of 2000 and under funded.¹⁴ However, the Investor and Capital Markets Fee Relief Act in 2002 exempted the SEC from federal pay restrictions and the

SEC received a large funding increase.¹⁵ This should indicate that the SEC became a more effective in the period this paper examines.

The heuristics study also sought to determine if the SEC targeted enforcement actions based on the potential harm for investors, or whether they aimed at serving as deterrents to the broader market.¹⁶ The overall (initial and updated) study looked at 389 securities class actions that settled between 1990 and 2002.¹⁷ The authors retrieved financial information about the defendant companies from the Compustat database.¹⁸ Then they searched for SEC enforcement actions against the defendants in the class actions. Only nineteen percent of those settlements had a parallel SEC enforcement action.¹⁹ To identify differences between those class actions with and without a parallel SEC action the authors compared the mean and median of each population in four different criteria.

The first comparison between the securities class actions with and without an SEC enforcement action was in the size of the settlement. Those cases with an SEC enforcement had a settlement almost two million dollars higher than those without²⁰ in the initial study, but for the expanded update the difference rose to twelve million.²¹ The difference may be a result of the expanded sample including more statistical outliers of large settlements from 2003 that skewed the data. The mean of the total sample rose from 9.8 million to 13.8 million, but the median only rose from 5.0 to 5.7, further suggesting the presence of large outliers that moved the mean, but not the median. 2003 may have been a year of particularly large class action settlements.

The next comparison between the class actions with and without a parallel SEC action was in market capitalization. If the SEC targeted larger companies, then the potential settlements would be larger and explain the difference in settlement amounts. However, the initial study found that the SEC targeted, on average, companies with smaller market capitalization.²² But in the expanded update, the data showed that the SEC had switched to targeting larger companies than the plaintiff's bar.²³ The SEC moved from targeting companies with an average of \$471 million to \$5 billion of market capitalization, while the mean market cap of stand alone suits rose from \$1.2 billion to \$1.9 billion. This increase by an order of magnitude in the SEC's enforcement showed that the SEC began targeting *much* larger companies in 2002.²⁴ The authors used the Compustat database to find market capitalization information, but were still unable to find data for companies that went bankrupt during the period.²⁵ Unfortunately, this comparison cannot be updated in this analysis because of the need for an historical financial information database, so an update of this comparison is beyond the scope of this paper.

Another explanation of the larger settlements could be that the class period is longer where the SEC has a concurrent enforcement action. That would result in more investors being exposed and a greater claim for damages.²⁶ In the third comparison the class period was longer for suits with SEC actions, by 4 months in the initial study²⁷ and six months in the update.²⁸ The SEC sample could have higher damages because the presence of an SEC action encourages settlement sooner by adding to the pressure on

defendants. And in fact the parallel SEC actions settled six months faster in the initial study,²⁹ but only two months faster in the update,³⁰ suggesting any advantage was fleeting.

For the fourth and final comparison, Cox and Thompson then examined whether the settlements in private suits were higher fractions of provable losses when there is an SEC action. The methodology to determine this was considerably involved, and required extensive information from the Compustat database, so it is beyond the scope of this paper. However, a brief description of the method is useful to understanding the final conclusions and understanding the landscape at the end of 2003. Provable loss is the difference in price investors sold the security for and what the price would have been but for the misrepresentation leading to the class action. To determine the true value of the stock, one needs to know the return at the time the cause of action arises, the return for the market index, the correlation of the individual return of the security to the market (beta), the asset specific intercept, and the error-term which cannot be explained by market events. To determine beta the authors analyzed the stock price of each defendant for two years before the class period began. Then the authors estimated the trading activity during the class period to arrive at provable losses³¹ (trading activity * the difference in price) Undoubtedly this is where the assistance of Dana Kiku, of the Duke University Department of Economics, was most valuable.

The authors found that the amount of a settlement was not correlated with the market capitalization of the firm.³² But the SEC was focusing on companies in financial

distress before 2001 because of the high likelihood that investors would be harmed.³³ The updated study found that with a parallel SEC action plaintiffs were recovering 16.2% of their provable losses (which was 3.5% higher than the mean recovery), and they were recovering five percent less (11.8%) of their losses without a suit.³⁴ The initial study concluded that the differences in recovery were significant, but not overwhelming, and overall recovery remained very low.³⁵ This may be because the method used to calculate provable loss is overly generous and overestimates the true value of the stock price (where it would have been) or overestimates the trading volume, but even if so, the relative difference between the parallel and non-parallel suits would remain- parallel suits can be expected to recover only a few percent more. The data also was consistent with the idea that many suits are meritless and small settlements are cheaper than litigating even to the dismissal or summary judgment stage. The authors found that contrary to the non-parallel actions, settlements for less than two percent of provable loss (the meritless suits) do not occur when there is an SEC enforcement action.

In summary, the updated study found that the SEC began targeting much larger companies in 2002, the length of class period and time to reach settlement increased after 2001, and the settlement amount increased dramatically.³⁶ The provable losses decreased drastically however, from an average of 13.8% before 2002 to 8.9% after.³⁷ With the drastic increase in settlement amounts in both private and parallel actions, the only explanation is that provable losses for defendants in class actions in 2002 grew much more than recovery did during the period. The companies being sued thus must have

gotten much larger and more traders must have been included in the class period.³⁸ This leads to the updated conclusion that the SEC responded to the scandals of 2001 and 2002 by swiftly targeting larger companies where investors suffered larger losses.³⁹

With this rather intense background in mind we can review the current status of the SEC and the securities class action environment before ending with new empirical data from 2005 to 2007.

THE CURRENT LANDSCAPE OF THE SEC AND CLASS ACTIONS

The SEC Enforcement Division is responsible for conducting investigations and prosecuting violators in federal courts and administrative hearings. The SEC has the authority to bring civil suits seeking injunctions (cease and desist orders) and monetary penalties and disgorgement of profits.⁴⁰ Professors Cox and Thompson noted that in 2002 the SEC's stated prioritization was first about the message to the industry, then about investor harm (the updating study infers that this became the Commission's primary goal after 2002), then deterrent value.⁴¹

This changed again because in 2007 the Commission stated that it used "risk assessment techniques to focus resources on those issues and entities that represent the greatest concern for investors and market integrity."⁴² This switch to a more nebulous and flexible standard seems appropriate when the SEC is asked to respond to the financial scandal *du jour*: stock options backdating, market timing abuses by hedge funds and

mutual funds, and now disclosures relating to the sub-prime market. Chairman Cox testified to Congress that the “risk-based and flexible approach guides the SEC’s examination program...[with the] objective to apply the taxpayer’s resources in ways that provide the biggest investor protection bang for the buck.”⁴³ But if the SEC is frequently shifting focus to the hot topics of the day, not all of which are appropriate for securities class litigation, then the divergence between the private suites and parallel suits should increase.

Professors Cox and Thomas also noted the trouble with staff turnover and meeting performance goals.⁴⁴ The Annual Reports of the SEC today paint a very different picture. The SEC’s budget for 2005 was \$913 million,⁴⁵ \$888 million in 2006,⁴⁶ and \$882 million in 2007.⁴⁷ For Fiscal Year 2008 the SEC’s budget request is \$905 million.⁴⁸ However, the SEC is doing much more now than it was even in 2002, when total annual enforcement actions only numbered about 600.⁴⁹ As shown in Table 1 below, enforcement actions have increased 150% in only 3 years, though the decline in annual budget seems to be having some effect on the overall number of enforcement proceedings the SEC engages it.

TABLE 1
TYPES OF SEC ENFORCEMENT PROCEEDINGS 1997-2002

	2005 ⁵⁰	2006 ⁵¹	2007 ⁵²
Civil Injunctive Actions	335	218	262
Administrative Proceedings	294	356	394
Report of Investigations	947	914	776
Total	1576	1488	1432

TABLE 2
SEC CIVIL AND ADMINISTRATIVE ENFORCEMENT PROCEEDINGS: 2001-2002⁵³

	2005	2006	2007
Financial Disclosure	29%	24%	33%
Investment Advisers/ Inv. Companies	16	16	12
Broker-Dealers	15	13	14
Securities Offerings	9	11	10
Insider Trading	8	8	7
Market Manipulation	7	5	5
Other	16	23	19
Total	100%	100%	100%

Where previously Professors Cox and Thomas found that half of the SEC's enforcement actions could give rise to a class action (non-shaded categories), Table 2, above, shows that still to be roughly the case. Forty-six, forty-three, and fifty percent of all enforcement actions could potentially give rise to a securities class action in the time period covered. That is over 700 possible class actions that could be brought in parallel with the SEC. The SEC also claims success in tackling staffing problems, due to its new pay parity authority. Staff turnover is more manageable than in 2002 when one-third of the staff was leaving every 2 years.⁵⁴

TABLE 3
SEC STAFF TURNOVER RATE⁵⁵

2005	2006	2007
7.50%	9.10%	8.60%

Other metrics show a less clear picture. The SEC says that the number of first enforcement actions filed within two years of beginning an investigation was sixty-five percent in 2005, sixty-four percent in 2006, and 2007 was fifty-four percent.⁵⁶ The

decrease in 2007 is attributed to more complex cases like issuer reporting and disclosure cases.⁵⁷ But the SEC still claims that it is successfully resolving almost all of the enforcements it is bringing in Table 4 below. “Successfully resolved” is defined as resulting “in a favorable judgment for the SEC, a settlement, or the issuance of a default judgment.”⁵⁸ If the SEC is decreasing the percentage of enforcement actions brought quickly because of more complex cases, yet is maintaining its high success rate, either the SEC has developed exceptional competence at obtaining success in enforcement actions in large complex cases, which should be reflected in higher settlements for parallel class actions, or the large and complex case strategy that forced the drop in enforcements brought between 2006 and 2007 has not caught up to the resolution figures yet, and the success rate will fall in the near future.

TABLE 4
ENFORCEMENT CASES SUCCESSFULLY RESOLVED⁵⁹

2005	2006	2007
91%	94%	92%

This picture is further confused by the SEC’s claims of money recovered. In 2005 the SEC claims to have won three billion dollars in disgorgement and penalties.⁶⁰ However, five cases alone are responsible for over one billion of those penalties.⁶¹ In 2006 the SEC claims recovery of \$3.3 billion, but two cases, AIG and Fannie Mae, account for over \$1.1 billion of those penalties.⁶² In 2007 the Commission won “only” \$1.6 billion.⁶³ It is unlikely that the steep decrease in 2007 was due to the smaller budget, as many of the cases resulting in penalties and disgorgement would have been in the

pipeline for years. It seems more likely that the anomaly is 2005 and 2006, with a few exceptional cases (in contrast, the largest single award listed in Major Enforcement Cases for 2007 is forty-five million dollars⁶⁴).

Based on this background, the SEC's impact on securities class actions should be less predictable. With the Commission changing focus and shifting increasingly limited resources to meet the market scandals, the impact on the types of traditional securities fraud that give rise to class actions will be hit or miss, depending on whether the hot issue of the day gives a private cause of action. Stock options backdating for example would give rise to many class actions, because of the financial misstatement aspect.

But as the SEC responds to violations of securities laws so the putative defendants will respond as well. The attention paid to sound corporate governance has increased dramatically since 2001. Boards of Directors are becoming more pro-active in monitoring and internal controls are more effective at detecting violations. This is partially in response to new director civil and criminal liability standards under Sarbanes-Oxley.⁶⁵ The SEC has also responded with guidance to Boards of Directors, giving them a roadmap to cooperation that often reduces or stops the SEC moving from an informal investigation to a documented enforcement action.⁶⁶ The Seaboard Report⁶⁷ lays out a list of thirteen conditions that will be taken into consideration on whether or not to take action against a company. This is a powerful incentive for companies to self-report and cooperate with Commission staff, in exchange for lenient treatment. This may have the effect of reducing private rights of action as well as SEC enforcement actions.

There is evidence that this is having an effect on securities class actions. In 2007 there were only 166 class action filings, fourteen percent below the relevant historical average (since the Private Securities Litigation Reform Act in 1995).⁶⁸ Twenty-three of the filings were at the end of the year and related to the sub-prime market.⁶⁹ Excluding those cases, which are likely the leading edge on the wave of “the next big thing” in securities class litigation, and 2007 had twenty-six percent fewer filings than the historical average.⁷⁰ 2006 had the lowest number of filings since 1996.⁷¹ According to Cornerstone Research, partners with Stanford Law School in maintaining the Securities Class Action Clearinghouse, the reason for the decrease in activity is that there is less fraud in the market because of stronger corporate governance.⁷² However, there may also be two other factors discouraging securities class actions.

In May 2006 the country’s most famous (or infamous depending on your view) plaintiff law firm was indicted for paying their clients kickbacks in over 150 lawsuits.⁷³ Bill Lerach, known as the “King of Pain” to corporate executives, agreed to plead guilty, along with two other partners at the firm; the three will serve an average of 24 months each in the federal big house and pay over eighteen million dollars in total fines.⁷⁴ The firm’s founder and namesake Melvyn Weiss has opted for trial and risks spending his remaining years in prison.⁷⁵ According to one metric, Milberg Weiss used to be the lead plaintiff’s counsel on fifty percent of all post-Reform Act settlements.⁷⁶ Even after they were indicted and separated into Lerach’s and Weiss’ firms they still combined for fifty-

four percent of all settled securities class actions as recently as 2006.⁷⁷ The prosecution of both partners cannot help but have a chilling effect on total class actions filed.

Finally, in a rare securities class action that went to jury trial the defendants were found not liable, which may embolden other defendants and encourage plaintiffs to seek lower settlements.⁷⁸ And in *Tellabs v. Makor*⁷⁹ the Supreme Court held that plaintiffs are required to plead facts that shows the inference of scienter at least as likely as not, a higher standard than what had previously been required.

Assuming there ever was a period of time that could be called “normal” in the securities class action arena, now is not that time. The SEC has shifted to a risk based approach and seems to prefer negotiating with putative defendants as a way to keep costs down and cover more ground with less resources to give “taxpayers more bang for the buck.” Actual securities class action filings are below historical levels, even with the full brunt of options back-dating and the rising sub-prime flood. How has this affected the outcome of recent class actions?

EMPIRICAL DATA ON SECURITIES CLASS ACTIONS 2005-2007

To examine the most recent period of securities class action activity and in a way that would enable comparison to Professors Cox and Thomas, their methodology was followed as closely as possible. The Index of Filings on the Stanford Securities Clearinghouse website⁸⁰ was examined and tabulated. To keep the sample size

manageable and the data as current as possible, only the filings from 2005, 2006, and 2007 were examined. This identified 182 for 2005, 118 filings for 2006, and 125 filings for 2007. Each filing was a notice or change in status for a case filed in that year. With the previous studies covering all settlements up to 2003⁸¹ it seemed reasonable to first restrict this analysis to settlements between 2005 and 2007. This also restricted the search to suits that were filled after 2005, to keep sample size manageable and current. This limitation did not appear to affect the time to reach settlement calculation, but it did contribute to the sample weighting heavily to actions in 2005. This was to a large extent inevitable, the tradeoff for using the most current data is that many of the class actions recently filed are still working their way through pleading, discovery, and settlement negotiation.

Each of these filings in the clearinghouse was reviewed, searching for evidence of a settlement. For consistency with the previous studies, any settlement where the only defendant paying was an accounting firm was excluded. Wherever possible the judicial final approval of the settlement was used for the ending date of the suit, but where the notice was ambiguous as to the stage of final or initial judicial approval the settlement was included in the population. In any case only settlements that had an agreed, liquidated amount were used. Out of the 425 filings, a sample of forty-six settlements was used. For each settlement the class period start and end dates were recorded, as well as the amount of the settlement, the date the first complaint was filed, and the date the settlement was agreed to, in addition to the defendant's party's name.

Next, the Enforcement Division of the SEC's website was searched, by defendant party's name, to identify parallel actions. Out of the forty-six settlements, only seven parallel actions were identified. It was shown in Tables 1 and 2 above that there could have been over 700 potential class actions each year parallel to SEC enforcement actions (50% of total enforcement actions because of distribution by enforcement area). Seven parallel actions seems low, however, that is fifteen percent of the total sample, which is identical to the overlap first found in 2002 by Professors Cox and Thomas.⁸² It seems reasonable to conclude that the changes the SEC is making in its enforcement policies have slightly reduced the overlap from the nineteen percent Cox and Thomas found in 2003.⁸³

After identifying the parallel cases, the data was analyzed as far as could be recreated without the Compustat database (or an economics professor). Based on Table 5 below, the mean recovery for all settlements has increased, while the private settlement recovery has decreased. The median recovery has increased from 2003 also. This could be due to the small sample size and the distortion from outlying settlements, but it could also suggest that the small nuisance suits that the heuristics study found⁸⁴ have become unprofitable since corporations began cooperating and receiving credit from the SEC, now under the sentencing guidelines corporations can reduce their liability by up to ninety-five percent. This would leave a smaller number of suits with more merit, which seems to fit the data.

TABLE 5
SETTLEMENT AMOUNT OF PRIVATE ACTIONS (\$ MILLIONS)

	Mean	Median	Number of Observations
Without a Parallel SEC Action	9.37	7	39
With a Parallel SEC Action	41.35	13.5	7
Total Sample	14.24	7.2	46

TABLE 6
CLASS PERIOD (MONTHS)

	Mean	Median	Number of Observations
Without a Parallel SEC Action	15.85	13	39
With a Parallel SEC Action	31	39	7
Total Sample	18.15	14.5	46

Table 6, above, shows the difference in class period with and without a SEC action. The longer the class period, the more investors likely affected by the action. The mean and median time rose in all categories from 2003.⁸⁵ The mean has risen by six months, and the median by four months. The median parallel action seems distorted by outliers however. While the class period has broadly lengthened, possibly contributing to the increase in settlement amounts, the time required to reach settlement has decreased broadly. The total mean has decreased by six months, and the median by three months. This too may be a result of increased cooperation between the SEC and defendants, or it may be that the sample lacks some of the complex mega-settlements from earlier that lasted for many years and skewed the data. In both time periods though a parallel action

lengthens the time period. In 2003 the time to reach a settlement was decreased by a parallel action.

TABLE 7
TIME TO REACH SETTLEMENT (MONTHS)

	Mean	Median	Number of Observations
Without a Parallel SEC Action	21.21	22	39
With a Parallel SEC Action	25.43	27	7
Total Sample	22.7	22.5	46

CONCLUSION

Based on the above empirical data the relationship between securities class actions and SEC enforcement actions has changed significantly in the short time since Professors Cox and Thomas last analyzed them in 2003. This is not surprising however, since they concluded that the relationship also noticeably changed in a little over a year in response to Enron and Sarbanes-Oxley. Since 2003 the public securities markets have had to endure market timing abuses by mutual funds, widespread stock option back dating, a change in defendant corporations' motivation to cooperate with the government, and are currently bracing for another wave of sub-prime litigation. Class action plaintiffs have also seen the Supreme Court make it more difficult for them to proceed and the leading plaintiff's law firm has been indicted and some of its partners sent to jail. With such an actively changing environment commentators should watch this arena closely, the only predictable change the law takes may be change itself.

¹ James D. Cox and Randall S. Thomas, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737, 777 (2003).

² James D. Cox and Randall S. Thomas, *Public and Private Enforcement of the Securities Laws: Have Things Changes Since Enron?*, 80 NOTRE DAME L. REV. 893, 906 (2004).

³ Cox, *supra* note 1, DUKE L.J. at 742.

⁴ *Id.* at 745.

⁵ *Id.* at 749.

⁶ Cox, *supra* note 2, NOTRE DAME L. REV. at 895.

⁷ Cox, *supra* note 1, DUKE L.J. at 749.

⁸ *Id.* at 750.

⁹ *Id.* In contrast violations of Broker-dealer regulations, violations committed by investment companies or adviser, market manipulation, and delinquent filings would not usually result in a private right of action that would lead to class certification. *Id.*

¹⁰ *Id.* at 751.

¹¹ *Id.* at 751 n. 50.

¹² *Id.* at 751.

¹³ See Cox *supra* note 1, DUKE L. J. at 753.

¹⁴ *Id.* at 558.

¹⁵ *Id.* at 558-59.

¹⁶ *Id.* at 760.

¹⁷ Cox, *supra* note 2, NOTRE DAME L. REV. at 895. This sample came from a previous study by Cox and Thomas and from searching the Stanford Securities Class Action Clearinghouse website.

¹⁸ See www.compustat.com. The database is a commercial product owned by Standard & Poor's.

¹⁹ Cox, *supra* note 2, NOTRE DAME L. REV. at 895.

²⁰ Cox, *supra* note 1, DUKE L. J. at 764.

²¹ Cox, *supra* note 2, NOTRE DAME L. REV. at 898.

²² Cox, *supra* note 1, DUKE L. J. at 765.

²³ *Id.* at 898.

²⁴ Cox, *supra* note 2, NOTRE DAME L. REV. at 901-902.

²⁵ Cox, *supra* note 1, DUKE L. J. at 765 n. 97.

²⁶ *Id.* at 766.

²⁷ *Id.*

²⁸ Cox, *supra* note 2, NOTRE DAME L. REV. at 898.

²⁹ Cox, *supra* note 1, DUKE L. J. at 767.

³⁰ Cox, *supra* note 2, NOTRE DAME L. REV. at 898.

³¹ Cox, *supra* note 1, DUKE L. J. at 768-69 n.100. The point is that this is complicated, and I haven't even mentioned the Kolmogorov-Smirnov test or the Probit model.

³² *Id.* at 773.

³³ *Id.* at 777.

³⁴ Cox, *supra* note 2, NOTRE DAME L. REV. at 898.

³⁵ Cox, *supra* note 1, DUKE L. J. at 778.

³⁶ Cox, *supra* note 2, NOTRE DAME L. REV. at 901-02.

³⁷ *Id.* at 900-01.

³⁸ *Id.* at 903.

³⁹ *Id.* at 906.

⁴⁰ See ABOUT THE DIVISION OF ENFORCEMENT, *available at*

<http://www.sec.gov/divisions/enforce.htm>.

⁴¹ Cox, *supra* note 1, DUKE L. J. at 751.

⁴² U.S. SEC. & EXCH. COMM'N, 2007 PERFORMANCE AND ACCOUNTABILITY REPORT 37 (2007).

⁴³ *Testimony Concerning Fiscal 2008 Appropriations Request Before the U.S. H. Subcomm. On Financial Services and General Government, Comm. on Appropriations, ___ Cong. March 27, 2007* (statement of Christopher Cox, Chairman, U.S. Sec. & Exch. Comm'n).

⁴⁴ See *supra* note 14 and accompanying text.

⁴⁵ U.S. SEC. & EXCH. COMM'N, 2005 PERFORMANCE AND ACCOUNTABILITY REPORT 5 (2005).

⁴⁶ U.S. SEC. & EXCH. COMM'N, 2006 PERFORMANCE AND ACCOUNTABILITY REPORT 7 (2006).

⁴⁷ U.S. SEC. & EXCH. COMM'N, 2007 PERFORMANCE AND ACCOUNTABILITY REPORT 7 (2007).

⁴⁸ *Testimony Concerning Fiscal 2008 Appropriations Request Before the U.S. H. Subcomm. On Financial Services and General Government, Comm. on Appropriations, ___ Cong. March 27, 2007* (statement of Christopher Cox, Chairman, U.S. Sec. & Exch. Comm'n).

⁴⁹ Cox, *supra* note 1, DUKE L. J. at 749.

⁵⁰ SEC 2005, *supra* note 45 at 7.

⁵¹ SEC 2006, *supra* note 46 at 8.

⁵² SEC 2007, *supra* note 47 at 25.

⁵³ *Id.* at 27.

⁵⁴ *See supra* note 14 and accompanying text.

⁵⁵ SEC 2007, *supra* note 47 at 42.

⁵⁶ SEC 2007 *supra* note 47 at 27.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ SEC 2005 *supra* note 45 at 7

⁶¹ *Id.*

⁶² SEC 2006 *supra* note 46 at 8-9.

⁶³ SEC 2007 *supra* note 47 at 25.

⁶⁴ *Id.* at 91.

⁶⁵ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.)

⁶⁶ One of the limitations of the SEC's published enforcement data is that it does not include informal investigations. Some of these informal investigations are presumably dropped because the suit is without merit, explaining why the SEC's success rate in Table 3 is so high, and many other investigations may result in a negotiated settlement. *See also* Cox, *supra* note 1 at n.91.

⁶⁷ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969 (Oct. 23, 2001). Ironically this release is widely known as the Seaboard Report, but nowhere in it is Seaboard, the parent company, mentioned.

⁶⁸ CORNERSTONE RESEARCH, 2007: A YEAR IN REVIEW 2 (2008).

⁶⁹ *Id.*

⁷⁰ 1- [(166-23)/ 194]. *See id.*

⁷¹ CORNERSTONE, *supra* note 68, at 5.

⁷² *Id.* at 3. There is also evidence that the stock market's strong performance and lower volatility is partially responsible for the decrease below historical average.

⁷³ Peter Elkind, *Milberg Weiss Faces the Music*, CNNMoney, Oct. 3, 2007, http://money.cnn.com/2007/10/01/news/companies/Melvyn_weiss.fortune/index.htm.

⁷⁴ *Id.* See also Alexis Unkovic, *Federal Judge sentences former Milberg Weiss partner Lerach to 2 Years in Prison*, Feb. 11, 2008, <http://jurist.law.pitt.edu/>.

⁷⁵ Elkind, *supra* note 73.

⁷⁶ LAURA E. SIMMONS & ELLEN M. RYAN, SECURITIES CLASS ACTION SETTLEMENTS 2006 REVIEW AND ANALYSIS 16 (2007). This is also published by Cornerstone Research. This report also confirms Professors Cox and Thomas, concluding that the median settlement for plaintiffs when there is a parallel SEC action is \$ 11 million, compared to \$5.5 million without and that plaintiffs receive 4.1% of estimated damages with the SEC but 3.4% without, out of a population of 638 settlements without the SEC and 178 settlements with. *Id.* at 13.

⁷⁷ *Id.*

⁷⁸ *In re JDS Uniphase Corp. Sec. Litig.*, NO. C-02-1486CW, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007).

⁷⁹ 127 S.Ct. 2499 (2007).

⁸⁰ <http://securities.stanford.edu/index.html>. The Clearinghouse is a repository for securities class action information, it contains authoritative and up-to-date information on

filings and statistics of securities class actions. The site is maintained by Stanford Law School and Cornerstone Research.

⁸¹ *Supra* note 6 and accompanying text.

⁸² Cox, *supra* note 1, DUKE L. J. at 777.

⁸³ Cox, *supra* note 2 NOTRE DAME L. REV. at 895.

⁸⁴ Cox, *supra* note 1, DUKE L. J. at 778

⁸⁵ Cox, *supra* note 2, NOTRE DAME L. REV. at 898.