

CORNERSTONE RESEARCH

Economic and Financial Consulting and Expert Testimony

# Opt-Out Cases in Securities Class Action Settlements

**2014–2018 Update**

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# Introduction

This report is the second update to the 2013 publication *Opt-Out Cases in Securities Class Action Settlements*, which provided the first comprehensive, quantitative analysis of publicly available information regarding “opt-out” securities cases. Opt-outs are cases in which at least one putative class member excludes itself from the class in order to pursue a separate lawsuit against the defendant.

This publication complements the prior studies with additional publicly available information about opt-outs from securities class action settlements agreed upon between January 1, 2014, and December 31, 2018. The database of 1,775 class action settlements from January 1, 1996, to December 31, 2018, contains 82 cases with opt-outs.<sup>1</sup>

# Executive Summary

Securities class action filings have increased significantly over the past few years and continue to be filed at near-record rates.<sup>2</sup> The majority of class actions end in a dismissal or a settlement, and putative class members have the ability to opt out of settlements in order to pursue their own cases.

Prior research has found that the most relevant predictor of opt-outs is the dollar amount recovered,<sup>3</sup> and studies in the post-PSLRA period have found that the prevalence of opt-out cases—efforts to achieve a larger recovery through settlement or judgment outside the class—has increased relative to the pre-PSLRA period.<sup>4</sup> The research in this and the previous reports has built on these findings by examining the prevalence of opt-out cases, year by year, and analyzing salient publicly available information related to these cases.

- Out of 382 securities class action settlements in 2014–2018, based on publicly available data, there were 34 opt-out cases.
- Overall, out of 1,775 securities class action settlements in 1996–2018, there were 82 opt-out cases.
- The likelihood of defendants facing an opt-out may be increasing. Prior to 2014, the rate of opt-outs in class action settlements was 3.4 percent, compared to 8.9 percent between 2014 and 2018.
- Opt-outs remain more likely to occur in larger-dollar class action settlements.
- Institutional investors such as pension funds, sovereign wealth funds, and hedge funds remain frequent participants in opt-outs.
- Recent court rulings on tolling the statute of repose were expected to make it harder for investors to opt out of settlements. They may, however, have had the unintended effect of resulting in more preemptive opt-outs by large investors such as pension funds and investment firms, which are able to afford the additional fees involved in bringing a separate lawsuit.
- If opt-outs become filed more frequently, it may result in inefficiencies for all parties in the court system, as courts may struggle with a higher caseload, defendants may spend more on legal fees, and plaintiffs may face more uncertainty about the necessity of opting out or remaining in classes.

*Recent court rulings on tolling the statute of repose may have had the unintended effect of resulting in more preemptive opt-outs by large investors.*

Figure 1: Securities Opt-Out Cases 2014–2018

Class Action Settlement Year	Number of Class Action Settlements	Number of Opt-Out Cases	Percentage of Opt-Out Cases to Class Action Settlements
2014	63	2	3.2%
2015	77	4	5.2%
2016	85	12	14.1%
2017	81	6	7.4%
2018	76	10	13.2%
<b>TOTAL</b>	<b>382</b>	<b>34</b>	<b>8.9%</b>

Source: Stanford Law School Securities Class Action Clearinghouse; *Factiva*; *Lex Machina*; Public Press; SEC Filings

# Opt-Out Securities Cases

This report identifies 82 cases from 1996 to 2018 in which at least one party from the class opted out, representing 4.6 percent of the sample of 1,775 cases.<sup>5</sup>

A large portion of these opt-outs (34 out of 82) occurred between 2014 and 2018. Indeed, there are preliminary indications that the proportion of opt-outs may be increasing over recent years.

Prior to 2014, the rate of opt-outs in class action settlements had been around 3.4 percent, but between 2014 and 2018, 8.9 percent of class action settlements had opt-outs. The years 2016 and 2018, in particular, had large numbers of class action opt-outs, with opt-outs in a total of 22 cases representing almost 14 percent of all class settlements in those years.

*The percentage of opt-out cases in 2018 was second only to 2016.*

**Figure 2: Securities Opt-Out Cases 1996–2018**

Class Action Settlement Year	Number of Class Action Settlements	Number of Opt-Out Cases	Percentage of Opt-Out Cases to Class Action Settlements
1996	1	0	0.0%
1997	14	0	0.0%
1998	29	3	10.3%
1999	64	1	1.6%
2000	90	1	1.1%
2001	95	2	2.1%
2002	111	6	5.4%
2003	94	1	1.1%
2004	110	5	4.5%
2005	119	2	1.7%
2006	90	6	6.7%
2007	108	2	1.9%
2008	97	1	1.0%
2009	99	4	4.0%
2010	85	4	4.7%
2011	65	0	0.0%
2012	56	3	5.4%
2013	66	7	10.6%
2014	63	2	3.2%
2015	77	4	5.2%
2016	85	12	14.1%
2017	81	6	7.4%
2018	76	10	13.2%
<b>TOTAL</b>	<b>1,775</b>	<b>82</b>	<b>4.6%</b>

Source: Stanford Law School Securities Class Action Clearinghouse; *Factiva*; *Lex Machina*; Public Press; SEC Filings

## Prevalence in Large Cases

Prior research has shown that, in general, as class action settlements increase in size, plaintiffs are more likely to opt out. Between 2014 and 2018, 28 percent of cases with class action settlements over \$20 million had associated opt-outs. Conversely, for class action settlements below \$20 million, the opt-out rate was only 2.1 percent. Over the entire 1996–2018 period, the research shows that 15 percent of cases over \$20 million had associated opt-outs, while for those under \$20 million the rate was only 1.3 percent.

Because of this disparity, class actions that settle above \$20 million represent a disproportionate amount of the cases that ultimately face an opt-out. While cases with settlements above \$20 million account for 26 percent of the 2014–2018 settlements, they represent over 80 percent of the opt-out cases that were identified over that period.

A similar effect is also seen among the largest “mega” settlements, where 15 of 23 cases with settlements over \$500 million in 1996–2018 had associated opt-outs. All four cases with settlements over \$500 million in 2014–2018 had associated opt-outs, compared with 7.4 percent of class action settlements below \$500 million.

Across all class action settlements between 1996 and 2018, 65 percent with settlements of \$500 million or greater had at least one related opt-out, compared with less than 4 percent of settlements below \$500 million.

## Plaintiffs

While previous research had found pension funds to be the most common plaintiffs in opt-out cases, appearing in almost half of the pre-2014 opt-outs, they were less involved between 2014 and 2018, only appearing in four out of 34 opt-outs in which parties were able to be identified.

The higher number of pension funds observed previously may have been driven in part by numerous opt-outs pursued by the Florida State Board of Administration, which did not file any opt-out suits in 2014–2018.

Non-pension institutional investors, including mutual funds, hedge funds, and other investment management firms, played a significant role and were parties in 15 of the 34 opt-outs in 2014–2018.

Individuals, trusts, and other companies had involvement in 30 of the 34 opt-outs. Trusts were involved in 12 such opt-outs, and two involved insurance companies.<sup>6</sup>

## Settlement Amount

In 22 of the 82 class action settlements with opt-out cases in 1996–2018, the settlement or judgment amount for some or all of the opt-out cases was publicly available. The largest set of opt-out settlements related to a single case, in terms of total dollar value, remains *AOL Time Warner Inc.*, where the \$764 million of opt-out settlements was 30.6 percent of the size of the class action settlement.<sup>7</sup>

The largest opt-out settlement amount as a percentage of the class action settlement was *Qwest Communications International Inc.*, where the \$411 million opt-out settlement was 92.4 percent of the final class action settlement.<sup>8</sup> Opt-out cases in the period covering 2014–2018 had less publicly disclosed settlement information than the research had found for the previous period covering 1996–2014.

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*Between 2014 and 2018, settlements greater than \$20 million were over 10 times more likely to have opt-outs than settlements of less than \$20 million.*

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# Issues in Opt-Outs—Recent Cases and Data

Pursuing opt-out litigation is not without risk to plaintiffs. In principle, class actions should reduce the individual cost of litigation for each plaintiff by spreading costs—allowing representation by a smaller number of firms, rather than each entity needing to pursue its own case and incur separate legal expenses. Nonetheless, at times, plaintiffs elect to opt out because of the potential for better outcomes. Between 1996 and 2014, in reported settlements opt-out plaintiffs received an additional 13 percent over other class plaintiffs, while in six cases, that opt-out premium was over 20 percent.<sup>9</sup>

Opt-out litigants may bring separate actions with the aim of reaching a quicker resolution, or to attempt to have the case heard in a more friendly location.<sup>10</sup> However, the timing of opt-out cases can vary significantly, as some recent examples show:

- In many cases, plaintiffs may choose to opt out after a settlement is finalized, as in *United Union of Roofers, Waterproofers & Allied Workers Local Union No. 8 v. Ocwen Financial Corporation*. Owl Creek I L.P. and Brahman Partners II L.P. separately opted out after Ocwen settled the class action for \$56 million on December 22, 2017.<sup>11</sup> Both opt-out cases settled for undisclosed amounts in February 2019.<sup>12</sup> Due to implications of recent rulings on the statute of repose (discussed below), a strategy of waiting until the initial settlement to view the class settlement terms before deciding to opt out may no longer be possible in some cases, as plaintiffs may not have enough time to pursue their own separate suits.

- Indeed, recently some plaintiffs have opted out even before a settlement is finalized, as in *In Re LendingClub Securities Litigation*. Fred Alger Management Inc. and Valinor Capital Partners L.P. filed separate complaints on May 16, 2018. LendingClub settled the main class action suit for \$125 million on July 20, 2018, and ultimately settled the opt-out suits two months later on September 27, 2018.<sup>13</sup>
- Furthermore, opt-out plaintiffs bringing preemptive claims may not always be able to achieve a faster resolution than the broader class, as evidenced by Maverick Fund L.D.C.'s opt-out suit from *In Re City of St. Clair Shores General Employees Retirement System v. Lender Processing Services Inc. (Lender Processing)*. Lender Processing Services finalized the settlement of the main class action suit on March 4, 2014, for \$13.1 million, whereas Maverick Fund, despite filing its separate case on August 8, 2013, did not settle its litigation until August 3, 2016.<sup>14</sup>

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## Implications of Rulings on the Statute of Repose

The research shows that, despite the uncertainty of results and the potential for substantial additional costs, opt-outs remain a significant (although still relatively small) part of the securities class action landscape. There is some indication of a potential increase in the number of opt-outs filed, and recent rulings on the statute of repose in the Securities Act of 1933 may have had the consequence of increasing the rate of opt-outs. In 2013, the Second Circuit held in *Police and Fire Retirement System of the City of Detroit v. IndyMac MBS Inc. (IndyMac)*<sup>15</sup> that the 1933 Act's three-year statute of repose could *not* be tolled during a pending class action.

Then in 2016, in *In Re Lehman Brothers Securities and ERISA Litigation (Lehman)*, the Second Circuit affirmed a lower court ruling that CalPERS, an investor and former class plaintiff, could not pursue individual action because the tolling of the three-year statute of repose relating to the initial class suit did not apply to the individual litigation.<sup>16</sup>

This ruling was appealed to the U.S. Supreme Court, in *California Public Employees' Retirement System v. ANZ Securities Inc. (CalPERS)*, where it was upheld in a 5-4 decision on June 26, 2017. These rulings on the statute of repose may have factored into the relatively large percentage of opt-outs in 2016–2018, as putative plaintiffs may have decided to opt out preemptively in order to preserve their right to sue.

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*Recent rulings on the statute of repose in the Securities Act of 1933 may have increased the rate of opt-outs.*

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## Will More Defendants Face Multiple Lawsuits?

Business groups tended to favor the outcome in *CalPERS*, as they did not expect a significant increase in opt-out litigation. In 2017, as *CalPERS* awaited a court decision, the U.S. Chamber of Commerce, the Washington Legal Foundation, the Securities Industry and Financial Markets Association (SIFMA), and The Clearing House all urged the Supreme Court to uphold the rulings in *Lehman* and *IndyMac*, filing amicus briefs with the Supreme Court.<sup>17</sup> Among other arguments, the Chamber of Commerce contended in its brief that upholding lower court decisions on tolling the statute of repose would not result in an “unmanageable flurry of protective filings and duplicative litigation.”<sup>18</sup>

An early test of this ruling came in October 2018, in the settlements of VEREIT, a successor to the real estate investment trust American Realty Capital Partners (ARCP). VEREIT entered into separate settlements of \$42.5 million, \$85 million, and \$90 million. These settlements, respectively, were with four hedge funds, several large investment funds including Blackrock and PIMCO, and Vanguard funds. The investment firms, which comprised nearly a third of ARCP's investor base, filed separately and preemptively after the decision in *Lehman*.<sup>19</sup> Notably, these opt-outs were both filed *and settled* before the main class action settled.<sup>20</sup>

If the VEREIT case is indeed a precedent, it is possible that rather than discouraging investors from opting out, the inability to toll the statute of repose may instead result in more and earlier opt-outs by plaintiffs with deeper pockets, such as institutional investors. This may have the added effect of driving up the cost of litigation for defendants, as they may need to defend multiple suits, sometimes in different jurisdictions.

# Blow Provisions

As noted in prior research, if larger shareholders are expected to opt out of a settlement, then defendants may have less incentive to settle the class action or may offer less money to settle with the class, which could increase the likelihood of trials.<sup>21</sup> So-called blow provisions, which allow the termination or renegotiation of the class action settlement by the defendant if a large enough portion of the class opts out, are one way to partially mitigate such incentives while managing the potential for future exposure.

The negotiation of blow provisions may have significant impacts on settlements, as defendants must weigh the number of additional suits they are willing to defend against the value of settling a matter and moving on. Plaintiffs must also consider the strategic value of a threshold that may deter or spur on additional suits in the context of negotiating a settlement. Blow provisions are discussed in further detail in *Considerations for Blow Provisions in Securities Class Action Settlements*, published by Cornerstone Research.<sup>22</sup>

A recent example demonstrates that these potentially important provisions can become public. *In Re Petrobras Securities* was settled in February 2018, and included a side agreement to set a threshold for opt-outs that could invalidate the settlement. This threshold was set at 5 percent of all claimants for defendant PwC Brazil, or class members with losses representing more than 5 percent of the total class damages for defendant Petrobras. Plaintiffs sought to file the terms of the agreement under seal, but the judge made this side agreement public.<sup>23</sup> Ultimately, only Washington State Investment Board, various Vanguard-related funds, and a number of other individuals and trusts filed requests for exclusion from the settlement.<sup>24</sup> Washington State subsequently settled its case for an undisclosed amount in December 2018.

In another example of the importance of careful blow provisions, the opt-out plaintiff from *Lender Processing* owned enough shares that the threshold was reached by the single entity opting out, and thus Lender Processing Services noted in its 10-Q that it was evaluating whether to proceed with the original settlement.<sup>25</sup> Ultimately, the original class settlement was finalized in 2014 and the opt-out settlement was finalized in 2016.<sup>26</sup>

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# Conclusion

This report, building on prior research, provides additional information and quantitative analyses of publicly available lawsuits and settlements of opt-out securities cases.

There is some early indication that the rate of opt-outs may be increasing, perhaps driven in part by precedent-setting rulings on the statute of repose. This development may create inefficiency for courts as they absorb a higher volume of cases. Further, it may pose risks for both plaintiffs and defendants in securities litigation through increased costs and legal fees for plaintiffs who must now decide earlier on whether to pursue their own case, and through greater uncertainty (and perhaps costs) for defendants who may now be forced to defend multiple suits about the same allegation.

Parties that reach settlements in securities class actions should consider the need for well-defined blow provisions, as they consider how best to set a threshold level for opt-outs that weighs the benefits and costs of overturning the settlement and reentering the active litigation stage.

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*Opt-outs remain a small yet significant part of the overall securities class action landscape.*

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Overall, the research indicates that opt-outs remain a small yet significant part of the overall securities class action landscape. Opt-outs are relatively rare in the typical securities class action settlement, but in the largest and mid-size cases they are a much more common occurrence, with opt-outs occurring in 15 percent of all settlements above \$20 million and 65 percent of all settlements above \$500 million from 1996 to 2018. With the number of opt-outs pursued by institutional investors and pension funds, the portion of the defendant's shares held by such investors is also an important consideration in assessing the likelihood of an opt-out.

# Endnotes

- <sup>1</sup> Consistent with prior reports, the results presented throughout this report are based on a review of publicly available information from public press articles, U.S. Securities and Exchange Commission (SEC) filings, and court documents for 382 incremental securities class action settlements in 2014–2018. Potential settlement class opt-outs and subsequent related cases were identified by reviewing public press articles one year before and after the class action settlement hearing date, and company SEC Form 10-K and Form 10-Q filings two years before and after the class action settlement hearing date. An initial SEC filing and public press search was carried out for each company with a class action settlement in the database. Key search terms included “opt-out,” “exclude,” and “individual action.” Cases where key search terms were found were further reviewed based on a wider date range of public filing, public press, legal journal, and internet searches. In those cases where search terms were found, if the list of excluded plaintiffs was available in the court docket through Lex Machina, the list of excluded names was searched in subsequent public filings in order to identify (to the extent available) any future lawsuits filed by the opt-out plaintiffs. While further legal actions could not be identified for every opt-out, the majority of cases in which an institutional investor or corporation opted out had evidence of further actions. For the purpose of this analysis, the collective opt-outs from a single class action case are considered as one instance of an opt-out (except where specifically noted). Similarly, while each case may have multiple defendants, they are referred to collectively as the defendant. Opt-out information is often not available until after settlements are finalized, and as a result the findings for 2014—which had been preliminarily identified in the 2016 version of this report (which covered settlements from 2012 through 2014)—were updated herein. For a similar reason, findings for 2018 documented in this report are preliminary and will likely be subject to increase over time as opt-out settlements are finalized and publicized.
- <sup>2</sup> *Securities Class Action Filings—2019 Midyear Assessment*, Cornerstone Research, 2019.
- <sup>3</sup> Theodore Eisenberg and Geoffrey Miller, “The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues,” *Vanderbilt Law Review* 57 (2004).
- <sup>4</sup> For example, see Kevin LaCroix, “Opt-Outs: A Worrisome Trend in Securities Class Action Litigation,” *Oakbridge Insights* 2, no. 3 (April 2007), p. 1.
- <sup>5</sup> Because the methodology in this report entails reviewing publicly available information, and (as noted above) because opt-out information is not necessarily available until after the settlement, opt-outs in 2018 might exist but not yet be publicly reported.
- <sup>6</sup> Many cases involve multiple opt-outs among various types of plaintiffs.
- <sup>7</sup> *In re AOL Time Warner Inc. Securities Litigation*. Complaint filed August 23, 2004. Settlement hearing date April 6, 2006.
- <sup>8</sup> *In re New England Health Care Employees Pension Fund v. Qwest Communications International Inc.* Complaint filed February 6, 2004. Settlement hearing date September 29, 2006.
- <sup>9</sup> *Opt-Out Cases in Securities Class Action Settlements 2012–2014 Update*, Cornerstone Research, 2016.
- <sup>10</sup> *Opt-Out Cases in Securities Class Action Settlements 2012–2014 Update*, Cornerstone Research, 2016.
- <sup>11</sup> *In Re United Union of Roofers, Waterproofers & Allied Workers Local Union No. 8 v. Ocwen Financial Corporation*, No. 14-CIV-81057 (S.D. Fla., December 22, 2017).
- <sup>12</sup> *In re Brahman Partners II L.P. v. Ocwen Financial Corporation*, No. 9:18-cv-90359-DMM (S.D. Fla., February 25, 2019); *In re Owl Creek I L.P. v. Ocwen Financial Corporation*, No. 9:19-cv-80506-BER (S.D. Fla., February 21, 2019).
- <sup>13</sup> *In Re LendingClub Securities Litigation*, No. 3:16-cv-02627-WHA (N.D. Cal., July 20, 2018); *Fred Alger Investment Management Inc. v. LendingClub Corporation*, No. 3:18-cv-02872-WFA (N.D. Cal., September 27, 2018); *Valinor Capital Partners L.P. v. LendingClub Corporation*, No. 3:18-cv-02887-WHA (N.D. Cal., September 27, 2018).
- <sup>14</sup> *In Re Maverick Fund L.D.C. v. Lender Processing Services Inc.*, No. 3:13-cv-01585-TJC-JBT (M.D. Fla., August 3, 2016).
- <sup>15</sup> *Police and Fire Retirement System of the City of Detroit v. IndyMac MBS Inc.*, No. 11-2998-cv(L) (2d Cir. June 27, 2013).
- <sup>16</sup> *In Re Lehman Brothers Securities and ERISA Litigation*, No. 15-1879 (2d Cir. July 8, 2016); *In Re Lehman Brothers Securities and ERISA Litigation*, No. 09 MD 2017 (LAK) (S.D.N.Y. July 27, 2011).
- <sup>17</sup> *California Public Employees’ Retirement System v. ANZ Securities Inc.*, Brief of Washington Legal Foundation Amicus Curiae in Support of Respondents; Alison Frankel, “Securities Fraud Defendant Agrees to Pay \$217.5 Million to Opt-Outs. A Portent?,” *Reuters*, October 29, 2018, <https://www.reuters.com/article/legal-us-otc-securities/securities-fraud-defendant-agrees-to-pay-217-5-million-to-opt-outs-a-portent-idUSKCN1N32JI>; “TCH Files Amicus in CalPERS v. ANZ Securities,” *The Clearing House*, April 5, 2017, <https://www.theclearinghouse.org/advocacy/articles/2017/04/20170405-tch-files-amicus-brief-in-calpers-v-anz-securities>.
- <sup>18</sup> *California Public Employees’ Retirement System v. ANZ Securities Inc.*, Brief for the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Respondents, pp. 26–29.
- <sup>19</sup> Alison Frankel, “Securities Fraud Defendant Agrees to Pay \$217.5 Million to Opt-Outs. A Portent?,” *Reuters*, October 29, 2018, <https://www.reuters.com/article/legal-us-otc-securities/securities-fraud-defendant-agrees-to-pay-217-5-million-to-opt-outs-a-portent-idUSKCN1N32JI>.

- <sup>20</sup> A \$1 billion settlement in the main class action was recently announced on September 9, 2019. Therefore, the settlement for VEREIT is not included in Cornerstone Research's *Securities Class Action Database* covering class settlements through 2018, and thus the corresponding opt-outs are not included in the overall count of opt-out settlements presented earlier in this report. As the class settlements and opt-outs databases are updated to include 2019, this case would figure in the counts for that year. Commentators have noted that the VEREIT class settlement might seemingly represent a larger recovery than that achieved by the opt-outs discussed in this report. As details of the opt-out settlements are confidential, that cannot be verified. While the opt-outs represented nearly a third of ARCP's investor base, it is unclear (until the claims process is completed) whether the opt-outs actually represented a third of the eligible class members that purchased shares during the class period. Additionally, the opt-out settlements may also discharge non-equity damage claims. Additional opt-out settlements were reached in 2019, also prior to the class settlement. This report focuses on and discusses opt-out activity in 2018.
- <sup>21</sup> John Coffee Jr., "Accountability and Competition in Securities Class Actions: Why 'Exit' Works Better Than 'Voice,'" *Cardozo Law Review* 30, no. 2 (2008), p. 435.
- <sup>22</sup> *Considerations for Blow Provisions in Securities Class Action Settlements*, Cornerstone Research, 2016.
- <sup>23</sup> "Petrobras Court's Denial of Plaintiffs' Request for Confidential Treatment of Opt-Out Provisions Could Undermine the Settlement Process," *Mintz - Securities Litigation Viewpoints*, February 15, 2018, <https://www.jdsupra.com/legalnews/petrobras-court-s-denial-of-plaintiffs-50956/>.
- <sup>24</sup> Order and Final Judgement, Exhibit 1, In re Petrobras Securities Litigation, July 2, 2018.
- <sup>25</sup> Form 10-Q for the quarterly period ended June 30, 2013, *Lender Processing Services Inc.*, p. 17. Order on Defendant's Motion to Dismiss Plaintiff's Third Amended Complaint, *Maverick Fund L.D.C. v. Lender Processing Services Inc.*, No. 3:13-cv-1585-J-32JRK, <https://www.leagle.com/decision/infdco20150922727>.
- <sup>26</sup> In Re Maverick Fund L.D.C. et al v. Lender Processing Services Inc., No. 3:13-cv-01585-TJC-JBT (M.D. Fla., August 3, 2016).

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The views expressed herein are solely those of the authors, who are responsible for the content, and do not necessarily reflect the views of Cornerstone Research or Latham & Watkins. The authors acknowledge the research efforts and significant contributions of their colleagues at Cornerstone Research and Latham & Watkins.

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